82-1417

No.

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In the Supreme Court of the United States

October Term, 1982

WALKER DIE CASTING, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Sixth Circuit in this case holding that the Petitioner Walker Die Casting, Inc. violated § 8(a)(5) of the Labor-Management Relations Act, as amended, by suspending negotiations with the certified collective bargaining representative of its employees when presented with a decertification petition filed by its employees with the National Labor Relations Board raising a question concerning representation, and further holding that the strike by the Petitioner's employees was converted from an economic strike to an unfair labor practice strike by that suspension is contrary to legal precedent established by this Court, by the National Labor Relations Board and by the other Courts of Appeals.

PARTIES

All parties to this proceeding are set forth in the caption. The original unfair labor practice charge before the National Labor Relations Board was filed by Local 259 of the Stove, Furnace and Allied Appliance Workers' International Union of N.A., AFL-CIO.

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No.

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WALKER DIE CASTING, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Walker Die Casting, Inc. petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the National Labor Relations Board (Appendix A, *infra*, pp. A1-A64) is officially reported at 255 NLRB 34. The Opinion of the Court of Appeals (Appendix B, *infra*, pp. A65-A69) is not officially reported. The Order of the Court of Appeals denying the Petitioner's Motion for Reconsideration (Appendix C, *infra*, p. A70) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1982. The Order denying the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was entered on November 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Labor-Management Relations Act of 1947, as amended, provide as follows:

> "*Section 8(a)*: It shall be an unfair labor practice for an employer—
>
> * * *
>
> (2) to dominate or interfere with the formation or administration of any labor organization. . . ;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."
>
> 29 U.S.C. § 158(a)

> "*Section 9(a)*: Representatives designated or selected for the purposes of collective bargaining by the majority in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment. . . .

(c)(1): Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A): by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a); . . .
>
> • • •
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . ."

29 U.S.C. § 159(a), (c).

STATEMENT OF THE CASE

This case presents a significant question in the administration of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 151, *et seq.*

This case was commenced by the filing of unfair labor practice charges by Local 259 of the Stove, Furnace & Allied Appliance Workers' International Union of North America, AFL-CIO (hereinafter referred to as "Union") alleging that the Petitioner Walker Die Casting, Inc. had violated various sections of the Labor-Management Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.* (the "Act") including Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). The charges arose out of an economic strike which commenced at the Petitioner's Lewisburg, Tennessee plant in August of 1979.

Following an administrative investigation of the charges, a complaint was issued by the general counsel of the National Labor Relations Board. The Board's administrative law judge issued a decision and order in which he found that the Respondent had violated Sections 8(a)(1), (2), (3), and (5) of the Act, by certain conduct which it engaged in during the strike. Although rejecting the allegations of the complaint that the strike was an unfair labor practice strike from its commencement, the administrative law judge found that the strike which began as an economic strike was converted to an unfair labor practice strike on August 27, 1979, when the Petitioner withdrew its last pre-strike offer to the Union.

Timely exceptions to the administrative law judge's decision were filed by the Petitioner with the National Labor Relations Board. With slight modification to the administrative law judge's findings with regard to one

allegation of Section 8(a)(1) conduct, the Board adopted the administrative law judge's findings and conclusions in their entirety and modified his remedial order to conform with those findings.

The Petitioner filed a timely petition for review of the Board's Order with the United States Court of Appeals for the Sixth Circuit pursuant to the provisions of Section 10(f) of the Act. The Sixth Circuit found that the Board had erred in its finding that the Petitioner's withdrawal of its last offer constituted a violation of Section 8(a)(5) of the Act, and, therefore, that the strike was converted to an unfair labor practice strike on August 27, 1979 because of that withdrawal. The Court found, however, that the Petitioner did violate Section 8(a)(5) of the Act when, following the filing of a valid decertification petition with the National Labor Relations Board by its employees on September 7, 1979, the Company advised the Union on September 11, 1979 that it would "not schedule further bargaining sessions until the petition [for decertification] has been resolved." The Court further held that the strike was converted to an unfair labor practice strike on and after September 11, 1979 by the Company's suspension of negotiations on that date. The Court also concluded that the remaining findings and conclusions of the Board were supported by substantial evidence and, therefore, entitled to enforcement.

The Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court by an Order entered on November 29, 1982.

REASONS FOR GRANTING THE WRIT

1. The decision of the Sixth Circuit Court of Appeals in this case decides an important question of federal law which has not been, but should be, settled by this Court as to the duty and obligation of an employer to bargain with the certified collective bargaining representative of its employees when presented with a petition for decertification filed with the National Labor Relations Board under the provisions of Section 9 of the Act when that petition presents a question of representation affecting commerce. In light of the substantial increase in the number of decertification petitions processed by the NLRB in the last three years,[1] more and more employers are presented with the decision which was presented to the Petitioner in this case—whether to continue negotiations with a union which may no longer represent a majority of its employees and thereby risk a violation of § 8(a)(2) of the Act, or to suspend negotiations, pending disposition of the petition and risk violation of § 8(a)(5) of the Act.

2. The decision of the United States Court of Appeals for the Sixth Circuit in this case, finding that the Petitioner violated Section 8(a)(5) of the Act when it advised the Union that it would not schedule further bargaining sessions until the decertification petition filed by its employees had been resolved, and, correspondingly, that the strike by the Petitioner's employees was converted to an unfair labor practice strike by that violation, is in conflict with

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1. According to the Forty-Fifth Annual Report of the NLRB covering Fiscal Year 1980, 1798 petitions to decertify existing bargaining representatives were filed in that twelve month period, comprising 13.3% of the total of 13,318 election petitions filed. In Fiscal Year 1981, ... decertification petitions were filed constituting .....% of the total of 12,177 election petitions filed. Forty-Sixth Annual Report of the NLRB.

the provisions of the Labor-Management Relations Act, as amended, prior decisions of the National Labor Relations Board and the decisions of other Courts of Appeals.

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, "subject to the provisions of Section 9(a)." Section 9(a) of the Act provides that only a representative "designated or selected . . . by the *majority* of the employees in a unit appropriate for such purposes" shall be the exclusive representative of the employees in that unit. Section 9(c) sets forth the procedure for determining questions of representation affecting commerce raised either by the filing of a petition alleging that a substantial number of employees wish to be represented for collective bargaining or asserting that the labor organization which has been certified as the bargaining representative for such a group of employees, is no longer a representative as defined in Section 9(a).

Under the Board's own rules and regulations, a petition for decertification supported by 30% of the employees in an appropriate unit raises a "question concerning representation affecting commerce" so that an election will be conducted by the Board to determine whether or not the labor organization does, in fact, still represent a majority of the employees in that unit. In this case, a petition supported by at least 30% of the employees in the unit represented by the Union was filed with the Regional Office of the National Labor Relations Board and an election was conducted pursuant to that Petition by the Board.

In *Telautograph Corporation*, 199 NLRB 892, 81 LRRM 1337 (1972), the Board held that an employer presented with a decertification petition from his employees

is justified in suspending negotiations with the employees' union pending disposition of the decertification proceeding:

> "[T]he decertification petition, supported by an adequate showing of interest . . . raised a question concerning representation. In *Shea Chemical Corporation*, 121 NLRB 1027, 42 LRRM 1486, the Board established the rule that when a real question concerning representation has been raised by the filing of a petition by a rival union that 'an employer may not go so far as to bargain collectively with the incumbent (or any other) union until the question concerning representation has been settled by the Board.' *The same rule should be applied where a real question concerning representation has been raised by the timely filing of a decertification* petition." 81 LRRM at 1337. (Emphasis added).

In an Advice Memorandum (an internal legal memorandum setting forth the Board's General Counsel's interpretation of the law under the Act) written to one of the Board's regional directors *in 1979* (the same year in which the suspension of negotiations occurred in this case), the obligation of an employer to suspend negotiations in the face of a valid decertification petition was summarized as follows:

> "Since the R.D. [decertification] petition has therefore raised a question concerning representation, and since the Employer, relying on the R.D. petition has simply refused to bargain for a new contract, *the Employer's conduct was considered privileged.*
>
> *"The rationale for the above result is that it would have been a Section 8(a)(2) violation for the Employer to have bargained for and executed a new*

contract in the face of the question concerning representation raised by the R.D. petition. Hence, it was not unlawful for the Employer to refuse to do so." (Emphasis added).

Gates Rubber Company, Case No. 27-CA-6387, 103 LRRM 1158 (1979). *See, also, Stoner Rubber Co.*, 123 NLRB 1440 (1959).[2]

The Sixth Circuit recognized that same obligation in *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974); *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973); and *Bally Case and Cooler, Inc. v. NLRB*, 416 F.2d 902 (6th Cir. 1969), *cert. denied*, 399 U.S. 910 (1970). *See also, NLRB v. Triplett Corp.*, 619 F.2d 586 (6th Cir. 1980). Although that Court reached a contrary result in *Rogers Manufacturing Company v. NLRB*, 486 F.2d 644 (6th Cir. 1973), cited as authority for the panel's decision in the instant case, that decision was based in part on the Court's finding that the employer in *Rogers* had engaged in a number of unfair labor practices before the filing of the decertification petition. To the extent that the court in *Rogers* might have held that the filing of such a petition would not justify a suspension of negotia-

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2. In *Dresser Industries, Inc.*, 264 NLRB 145 (September 30, 1982), the Board, noting that existing law permitted an Employer to suspend bargaining with an incumbent Union upon the filing of a valid decertification petition raising a question concerning representation as set forth in its earlier decision in *Telautograph Corporation*, 199 NLRB 892 (1972), overruled its earlier holding in *Telautograph* and held that the filing of such a petition would not, therafter, permit an employer to suspend bargaining with an incumbent Union. Recognizing that its decision overruled eixsting law as established in *Telautograph*, the Board found no violation of Section 8(a)(5) by the Respondent in *Dresser Industries* "inasmuch as Respondent *was acting in accordance with existing Board law*, ..." That "existing Board law" was the same law under which the Petitioner Walker Die Casting, Inc. acted when it suspended negotiations with the Union in September of 1979.

tions, that holding is contrary to the Board's holding in *Telautograph* as well as the holdings of several other Courts of Appeals which have followed *Telautograph*.

The Fifth, Eighth and Ninth Circuit Courts of Appeals have expressly recognized and followed the Board's decision in *Telautograph Corporation*, holding that the filing of a valid decertification petition justifies the suspension of negotiations by an employer pending resolution of the question concerning representation raised by such a petition. *Sahara-Tahoe Corporation v. NLRB*, 648 F.2d 553 (9th Cir. 1980); *J. McDermott & Co., Inc. v. NLRB*, 571 F.2d 850 (5th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978); *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974).

3. The holding of the Sixth Circuit in this case that the Union's strike was converted to an unfair labor practice strike on September 11, 1979 is contrary to the decision of this court in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and to the decisions of every other Court of Appeals that has ruled on the issue of the conversion of an economic strike to an unfair labor practice strike. The law is clear that in order for a strike which begins as an economic strike to be converted into an unfair labor practice strike, the strike must be *intensified* or *prolonged* by unfair labor practices committed by the employer. *See, e.g., NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Pittsburgh & New England Trucking Co. v. NLRB*, 643 F.2d 175 (4th Cir. 1981); *NLRB v. Proler International Corporation*, 635 F.2d 351 (5th Cir. 1981); *NLRB v. Topp Manufacturing Co., Inc.*, 486 F.2d 644, 649 (6th Cir. 1973); *Allied Industrial Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 886 (D.C. Cir. 1973).

A violation of the Act alone does not convert an economic strike into an unfair labor practice strike. *Skrl Die Casting, Inc. v. NLRB*, 651 F.2d 1218, 1219 (6th Cir. 1981); *Pittsburgh & New England Trucking Co. v. NLRB*, 643 F.2d 175 (4th Cir. 1981); *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978). Absent substantial evidence of a *causal link* between an unfair labor practice committed by the employer and the continuation of the strike, the strike remains an economic one. *NLRB v. Proler International Corporation*, 635 F.2d at 354; *Cagle's Inc. v. NLRB*, 588 F.2d 943, 950 (5th Cir. 1979); *Gulf States Manufacturers, Inc. v. NLRB*, 579 F.2d 1298, 1327 (5th Cir. 1978); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1079-80 (1st Cir. 1981). In order to support a finding that a strike is in protest of an employer's unfair labor practices there must be evidence that the strike is *primarily* because of the unfair practices of the employer, and that such practices *actually were considered by* the employees in their decision to strike or to continue the strike. *Soule Glass & Glazing Co. v. NLRB, supra*, at 1080-1; *C. K. Smith & Co.*, 227 NLRB 147, 95 LRRM 1617 (1977); *C & E Stores, Inc.*, 221 NLRB 218, 91 LRRM 1057 (1976). Neither the Administrative Law Judge, the Board, nor the Sixth Circuit made any finding that the Petitioner's suspension of negotiations after the filing of the decertification petition was considered by the striking employees or constituted a factor which "intensified or prolonged" the strike. Indeed, there were no facts in the record which would have supported such a finding. The only discussion of unfair labor practices by the union or its members as part of the decision to continue the strike occurred in January 1980, after the decertification election and after most of the strikers had returned to work. This case represents the classical situation recognized by the Fourth Circuit in *Winn Dixie Stores, Inc. v. NLRB*, 448 F.2d 8, 12 (4th Cir. 1971) as a "clearly

apparent . . . [attempt] to salvage an unsuccessful economic strike. . . ."

4. A determination that an employer is justified in suspending negotiations with the certified collective bargaining representative of its employees upon the filing of a valid decertification petition which raises a question concerning representation is required to clarify the rights of an employer when presented with conflicting claims regarding the representation of its employees and to protect the rights of those employees themselves who are following the procedures set forth in the Act to test the majority status of a collective bargaining representative whom they no longer desire to have represent them. If the decision of the Sixth Circuit in this case is permitted to stand, employers would be required to continue to negotiate with and, where possible, reach agreement with a collective bargaining representative who may no longer represent a majority of its employees. Such a requirement precludes the right of employees conferred by § 7 of the Act to be represented by an organization chosen by a majority of those employees in accordance with the procedures set forth in the Act, and places their employer in the position of risking a violation of § 8(a)(2) of the Act on one hand by negotiating with a union which does not represent a majority of its employees, and a violation of § 8(a)(5) on the other if it suspends negotiations pending resolution of the question concerning representation.

5. This Court should also clarify the elements of proof necessary to support a finding that an economic strike has been converted to an unfair labor practice strike where there is no evidence that the factors relied upon by the Board to support such a finding were ever considered by the striking employees as an issue which "intensified" or "prolonged" the strike which clearly began as an economic one.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 26-CA-8196,
26-CA-8213-1-3,
26-CA-8227,
26-CA-8396, and
26-CA-8477

WALKER DIE CASTING, INC.

and

LOCAL 259, STOVE, FURNACE, AND ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and

EMPLOYEE COMMITTEE
Party in Interest

DECISION AND ORDER

On November 19, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has de-

cided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

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1. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

2. The Administrative Law Judge found that Respondent, by posting its August 16, 1979, notice, violated Sec. 8(a)(1) and (5) of the Act by communicating directly with employees, soliciting employees to refuse to honor a strike if one is called, and advising employees to resign from the Union to avoid a fine. We agree with the Administrative Law Judge, but for reasons other than those cited in his Decision. *Lehigh Lumber Company, and Brown-Borhek Company*, 230 NLRB 1122, fn. 1 (1977), cited by the Administrative Law Judge in support of his conclusions, is distinguishable from the case at hand since the respondent in *Lehigh, supra*, in an effort to induce an employee to abandon the union, promised him increased wages and benefits which had not been offered the union. However, the record herein amply supports the finding of a violation of Sec. 8(a)(1) and (5) of the Act. First, although Respondent advised employees to resign from the Union to avoid a fine, the Union had made no threat to fine employees. In addition, Respondent, after posting the August 16, 1979, notice, unilaterally raised starting wages, unlawfully withdrew its last contract offer and ceased to bargain, made numerous coercive comments including threats to "bust the Union," and finally established an unlawful "Employee Committee" as an alternative to the Union. These actions establish a pattern of conduct clearly intended to dissipate employee support for the Union as the sole collective-bargaining agent. We find that the August 16 notice was not an innocent attempt by Respondent to advise employees of their rights or to give notice of the intention to operate during the strike, but was calculated to undermine the Union and set the stage for further attempts to bypass and ignore the Union, all in violation of Sec. 8(a)(1) and (5) of the Act. See *Bromine Division, Drug Research, Inc.*, 233 NLRB 253, 263 (1977), enfd. 621 F.2d 806 (6th Cir. 1980); *O'Land, Inc. d/b/a Ramada Inn South*, 206 NLRB 210, 219 (1973).

3. The recommended Order and notice have been modified to remedy all unfair labor practices found by the Administrative Law Judge and to clarify the reinstatement rights of returning strikers. *Larand Leisuretiez, Inc.*, 213 NLRB 197, 198 (1974), enfd. 523 F.2d 814 (6th Cir. 1975).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Walker Die Casting, Inc., Lewisburg, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Interfering with, restraining, and coercing the employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by threatening not to reinstate employees because of the employees' union activities; threatening employees that they were to mind their knitting when they returned to work because of their union activities; threatening to get rid of the Union; offering wage increases in order to induce its employees to break the strike and return to work; telling employees that if it had to reinstate everybody in the Union, it was in no hurry to start back to negotiations; threatening to shut the door of the plant rather than continuing to deal with the union president; telling its employee that by returning to work after engaging in the strike she had lost her seniority status; informing employees that they would not be considered for employment until after the decertification election; removing its employees' picket signs; advising employees to resign from the Union; soliciting employees to refuse to honor a strike; engaging in surveillance of its employees' union activities; threatening its employees that there would be no more collective-bargaining agreements

with the Union; and telling its employees that they would have a good place to work once the Union was defeated."

2. Substitute the following for paragraph 1(f):

"(f) Unilaterally, without bargaining with Local 259, Stove, Furnace, and Allied Appliance Workers' International Union of North America, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the above-described unit, changing its wages or other conditions of employment, unilaterally establishing an employee committee, withdrawing its last contract proposal, or communicating directly with employees instead of bargaining with the above-named Union."

3. Add the following sentence at the end of paragraph 2(a):

"If, after such discharges, sufficient jobs are not available for these employees, they shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice theretofore utilized by Respondent, and they shall be offered employment before any other persons are hired."

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. March 24, 1981

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
Don A. Zimmerman, Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT threaten our employees that we will not reinstate them because of their activities on behalf of Local 259, Stove, Furnace, and Allied Appliance Workers' International Union of North America, AFL-CIO, or any other labor organization, or because they engage in strike activity.

WE WILL NOT tell our employees that they are to mind their own knitting because of the employees' union activities.

WE WILL NOT threaten to get rid of the Union.

WE WILL NOT offer our employees higher wages in order to induce our employees to break a strike and return to work.

WE WILL NOT tell our employees that we are in no hurry to resume collective-bargaining negotiations if we have to reinstate everybody in the Union.

WE WILL NOT threaten our employees with plant shutdown because we have to deal with the union president.

WE WILL NOT tell employees that they have lost their seniority by engaging in a strike.

WE WILL NOT inform our employees that reemployment will have to await a decertification election.

WE WILL NOT remove our employees' picket signs from public property.

WE WILL NOT advise employees to resign from the Union nor solicit employees to refuse to honor a strike.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT threaten our employees that there will be no more collective-bargaining agreements with the Union.

WE WILL NOT inform our employees that they will have a good place to work once the Union is defeated.

WE WILL NOT discharge or refuse to reinstate our employees or otherwise discriminate against our employees because of their strike activities or union activities.

WE WILL NOT form, assist, support, dominate, or interfere with the Employee Committee.

WE WILL NOT vary or abandon any wage, hour, or other substantive benefit established for our employees as a result of our dealing with the Employee Committee.

WE WILL NOT recognize and will completely disestablish the Employee Committee, or any successor thereto, as the representative of our employees concerning wages, rates of pay, hours of employment, or any other terms and conditions of employment, including the settlement of grievances.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms

and conditions of employment with Local 259, Stove, Furnace, and Allied Appliance Workers' International Union of North America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT unilaterally change our wage rates, or other conditions of employment, or establish an employee grievance committee without first negotiating with the above-mentioned Union as the exclusive representative of the employees in the bargaining unit described below; withdraw our last contract proposal; nor communicate directly with employees instead of bargaining with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer immediate and full reinstatement to: Cathy Becquet, Dickie Adkins, Lacon Crossland, Sam Cook, Michael Cross, Robert Hayes, Michael Holder, Larry Jones, Jimmy Prince, Larry Peters, E. W. Woodward, David Wentzell, Alfred Jett, Dewey Wayne Rowe, Michael Wayne Brewer, Charles E. McCord, Ann Derryberry, Eddie Ward, Clyde Erwin, Sherry D. Willoughby, David Sherin, Chit Derryberry, James D. Flowers, Gary McClendon, Wesley Poteete, Sandra D. Luna, Jimmy Winchester, Raymond P. Osborne, Edel Sparks, Eugene Pullen, Roy Rowe, Paul Rowe, James E. Stewart, Becky Gillium, William Frank Stewart, Margaret Neill, Karon Pischel Wells, Nancy Reed, John Liggett, Stanley Galbraith, Marie Logue, Ruby Eckenroth, Larry S. Hopper, Shirley P. Metcalf, Nancy Diane Smith, Sam L. Cook, Jr., Ben

Porterfield, William F. Davis, Thomas R. Smith, Roy Garrett, Ronnie L. Burns, Wilburn Phillips, James Stegall, Chestley H. Derryberry, Mark Welch, William Edwin Taylor, Bill D. Spence, Eddie Ward, Frankie Moore, Wendell J. Rowe, Jackie Metcalf, Mark Welch, and Denise Luker to their former jobs or, if their jobs no longer exists, to substantially equivalent jobs, discharging, if necessary, any replacements hired on or after August 27, 1979. If, after such discharges, sufficient jobs are not available for these employees, they shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice theretofore utilized by us, and they shall be offered employment before any other persons are hired, and WE WILL make each of those employees whole, with interest, for any loss they may have suffered as a result of our discrimination against them.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, including shipping, receiving, and tool crib employees, excluding all office clerical employees, technical and professional employees, and supervisors as defined in the Act.

Walker Die Casting, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower, 8th Floor, 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901--521-2687.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

CASES 26-CA-8196
26-CA-8213-1-3
26-CA-8227
26-CA-8396
26-CA-8477

WALKER DIE CASTING, INC.

and

LOCAL 259, STOVE, FURNACE, AND ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and

EMPLOYEE COMMITTEE
(Party in Interest)

Robert G. Levy, II, Esq.,
Counsel for the General Counsel.
William N. Ozier, Esq.,
Counsel for Respondent.
Carroll D. Kilgore, Esq.,
Counsel for Charging Party.

DECISION

Statement of the Case

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on June 16, 1980 through June 19, 1980, at Lewisburg, Tennessee. The charge in Case 26-CA-8196 was filed on December 13, 1979, and amended on December 21, 1979. The 26-CA-8213-1 charge was filed on January 1, 1980. The charge in 26-CA-8213-3 was filed on January 3, 1980, and amended on January 16, 1980. Case 26-CA-8227 was filed on January 16, 1980, and amended on January 29, 1980. Case 26-CA-8396 was filed on April 23, 1980. Case 26-CA-8477 was filed on June 9, 1980, and amended on June 12, 1980. An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on February 22, 1980. An Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing issued on May 21, 1980, and was amended on at the hearing on June 16, 1980, to allege:

(1) Respondent engaged in violations of Section 8(a)(5) by failing to recognize and bargain collectively with the Charging Party (Union) by (a) proposing that employees be allowed to revoke union dues checkoff authorizations at any time within 10 days' notice; (b) suggesting that union members resign their union membership before crossing the picket line to avoid the possibility of a fine by the Union; (c) withdrawing its last contract offer presented during negotiations; (d) unilaterally implementing wage increases in excess of those offered during negotiations; (e) unilaterally implementing an attendance bonus; (f) making the attendance bonus applicable on a weekly basis, then changing it to monthly, and back to weekly again; (g) unilaterally establishing an employee

grievance committee; and (h) refusing to recognize and bargain with the Union since September 11, 1979.

(2) Respondent engaged in violations of Section 8(a)(3) by failing and refusing to reinstate numerous employees following their unconditional offers to return to work and by discharging numerous employees, including various probationary employees and employee Cathy Becquet.

(3) Respondent engaged in violations of Section 8(a)(2) by establishing, recognizing and bargaining with an Employee Committee.

(4) Respondent engaged in violations of Section 8(a)(1) on numerous occasions; and

(5) Respondent caused and prolonged a strike by its employees, through the unfair labor practices alleged in the complaint.

Upon the entire record, my observation of the witnesses and after due consideration of the briefs filed by General Counsel and Respondent, I hereby make the following:

Findings[1]

Since 1971, Respondent and the Union have been parties to several collective-bargaining agreements. During

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1. Neither the allegations regarding commerce nor the status of the Charging Party are in dispute. The complaint alleges, the Respondent admitted, and I find, that Walker Die Casting, Inc. is a corporation with a place of business in Lewisburg, Tennessee, where it is engaged in the manufacture and non-retail distribution of custom zinc and die castings. Respondent admitted, and I find, that annually, during the course and conduct of its business operations, it has sold and shipped from its Lewisburg, Tennessee facilities goods and materials valued in excess of $50,000 directly to points outside the State of Tennessee and it purchased and received at its Lewisburg facility products,

(Continued on following page)

that period Respondent continuously represented Respondent's production and maintenance employees.[2]

During early 1979, Respondent asked the Union to engage in early negotiations. The collective-bargaining agreement in existence at that time was set to expire on August 18, 1979.

However, negotiations did not begin until the parties met on June 29, 1979. Thereafter, negotiation sessions occurred on August 7, 13, 14, 16 and 17, 1979.

On August 18, 1979, Respondent employees struck.

General Counsel contends that Respondent did not engage in good faith bargaining and that the strike was an unfair labor practice strike. In consideration of whether the strike was an unfair labor practice strike from its inception, the complaint alleges two matters which occurred on or before August 18 as contributing causes to

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Footnote continued—

goods and materials valued in excess of $50,000, directly from points outside the State of Tennessee. Respondent admitted, and I find, that at all material times it was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The complaint alleged, the Respondent admitted, and I find, that the Charging Party (Union) is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

The complaint also alleged and on the basis of unrebutted record evidence I find that the Employee Committee constituted an employee representation committee in which employees participated and which existed for the purpose of dealing with Respondent concerning grievances and conditions of work. On the basis of that allegation and the record evidence, I find that the Employee Committee constituted a labor organization within the meaning of Section 2(5) of the Act.

2. The unit, which Respondent admitted to be an appropriate unit, is described as: "All production and maintenance employees, including shipping, receiving, and tool crib employees, excluding all office clerical employees, technical and professional employees, and supervisors as defined in the Act."

the strike: (1) Respondent, during contract negotiations, proposed that employees be allowed to revoke union dues checkoff authorizations at any time within 10 days' notice; and (2) Respondent suggested to employees that the union members resign their union membership before crossing the picket line to avoid possibility of a fine by the Union.

Following the beginning of the strike, Respondent allegedly engaged in numerous Section 8(a)(1) violations beginning in August 1979 and extending into the spring of 1980. Additionally, Respondent allegedly engaged in other Section 8(a)(5) violations; Section 8(a)(3) violations by refusing to reinstate some employees and discharging others; and Section 8(a)(2) violations by establishing, recognizing and bargaining with an Employee Committee.

During the strike there was very little contact between the Respondent and the Union. On September 7, 1979, the Union submitted a contract proposal to Respondent. However, on September 11, 1979, Respondent notified the Union that it did not "feel that any further meetings can be scheduled until the petition has been resolved."[3] No further negotiations occurred between the parties after August 17, 1979.

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3. A decertification petition (26-RD-458) was filed with Region 26 on September 6, 1979. A Stipulation for Consent Election agreement was approved by the Regional Director on October 2, 1979. An election was held on October 19, 1979. The tally of ballots of that election indicated there were approximately 205 eligible voters, 58 votes were cast for the Union, 70 votes were cast against the Union and there were 36 challenged ballots which were determinative. Union objections were filed on October 26, 1979. A hearing was directed and held on December 10-14, 1979. However, no decision or recommendation issued as a result of that hearing. On February 7, 1980, an order issued dismissing the 26-RD-458 petition. A request for review was filed by Respondent on February 19, 1980. That request for review was denied by the Board on April 3, 1980, without prejudice to the petition being reinstated, but depending on the outcome of the instant proceeding.

Conclusions

A primary question in this case is whether the August 18 strike was an unfair labor practice strike and, if so, whether it was an unfair labor practice strike from its inception, or whether it started as an economic strike but was, at some point, converted to an unfair labor practice strike. Therefore, I have categorized the complaint allegations on the basis of pre-strike allegations and on allegations regarding incidents which occurred following commencement of the strike.

(1) *Pre-strike Allegations*:

(a) *The negotiations*:

General Counsel, in his brief, contends that Respondent, during negotiations with the Union, engaged in surface bargaining. In consideration of Respondent's conduct prior to the employees' August 18 strike, I find little support for General Counsel's contention.

Respondent's president, Robert Walker, testified that during early 1979 he asked the Union to engage in early negotiations. No evidence was offered to contest Walker's testimony in that regard. The Union's vice-president, E. Ray Sullivan, admitted that Walker contacted the committee in January or February 1979 and indicated that he would like to start negotiations early. Sullivan testified that he told Walker that he was ready to start negotiations at any time. However, Sullivan admitted that the Local did not respond to Walker's request to start early. Furthermore, there is no evidence that the Union sought to start negotiations prior to June 11.

On June 11 the Union wrote Respondent requesting negotiations. On June 29 the parties met at the first negotiations session. At that time the Union presented its pro-

posals. According to the testimony of Robert Walker, the Union's June 29 proposed contract was exceedingly long.

In early August, Respondent countered with its own contract proposals. During the negotiations sessions of August 13, 14, 16 and 17, proposals from both parties were on the table. The Union's original proposal appears to contain some 48 separate articles.

Mr. Sullivan admitted that on August 17 the only matters left unresolved included wages, the merit system, dues checkoff, shift preference and temporary transfers. During the August 17 session an agreement was reached on a number of items including payment of the 20¢ shift premium differential, a grievance procedure and the length of the agreement.

Regarding the outstanding issues, General Counsel, in its brief, points out that Respondent did not furnish its wage proposal unitl August 14—three days before the contract expired at midnight on August 17.

General Counsel also pointed to the temporary transfer issue in support of its argument. During negotiations Respondent argued that that provision should be changed to avoid confusion as to its intent—confusion which had already resulted in an arbitration case.

General Counsel also pointed to the disagreement regarding the merit system. As to that issue, during negotiations the Union sought to eliminate the merit system provision of the contract on the assertion that the system was not working. In support of its argument, the Union pointed out that some senior employees had not reached the top pay for their classifications. Respondent argued that the system was working and insisted on retaining that provision.

I find nothing in the above matters which would contribute to a finding of surface bargaining. Although Respondent's wage proposal of August 14 gave the Union little time before the contract expiration, I must recall that the Union was offered an opportunity by Respondent to engage in early negotiations. Also, the Union's proposal of June 29 was extensive. Therefore, I do not find that Respondent was dilatory in making a wage proposal on August 14. As to the temporary transfer and the merit system provisions, I find nothing improper in Respondent's position.

The remaining question presented by General Counsel—one that is alleged as violative by the complaint—was Respondent's proposal to change the contract's union dues checkoff provisions. Respondent's proposal did not seek to eliminate dues checkoff but to change the provision to permit employees to revoke their checkoff authorization on 10 days' notice. I have examined the cases in this regard,[4] but I have found nothing which would warrant my finding a violation. Although Respondent insisted on its dues checkoff proposal, it was during the same negotiations sessions agreeing to accept various union proposals and agreeing to change or drop proposals which it had made.

In the circumstances of Respondent's proposal there were no other factors which demonstrated, during the period before the strike, that Respondent was bargaining in bad faith.

Therefore, I find that by proposing to amend the dues checkoff provision to permit employees to revoke their

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4. *Markle Manufacturing Company of San Antonio,* 239 NLRB No. 187 (1979); *Sweney and Co. v. N.L.R.B.,* 437 F.2d 1127, 76 LRRM 2321 (C.A. 5, 1971), enforcing in part 176 NLRB No. 27; *Longhorn Machine Works,* 205 NLRB 685 (1973).

authorization at any time with a 10 days' notice, Respondent did not engage in conduct violative of the Act.[5]

(b) *The August 16, 1979 memo to employees*:

Robert Walker testified that he advised employees by August 16, 1979 memo as follows:

8/16/79

TO: All Employees of Walker Die Casting, Inc.

SUBJECT: Company Plans -

As all of you know, we are currently negotiating with our Union a new contract to replace the one we now have, which expires at midnight, Friday, August 17th. It is the Company's intention to do all that is in its power to reach a mutually agreeable contract with the Union by the above date. We are confident that the Union negotiating committee will reciprocate.

However, if a contract is not agreed on and there is a strike, the Company plans to operate the plant. Work will be available for any employees who wish to report. Employees, who are members of the Union, may want to resign from Union membership before crossing the picket line in order to avoid the possibility of a fine by the Union. You may resign by sending a certified letter to the Union, with a copy to the Company.

In the event of a strike by the Union, the Company plans to open for work on Tuesday, August 21, at 7:00 a.m., for anyone who desires to report.

An announcement will be put on the radio on Sunday, August 19, stating the Union's decision whether to accept or reject the contract.

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5. *Midwest Casting Corp.*, 194 NLRB 523 (1971).

Anyone, who has any questions, may contact the Company on Monday, August 20th.

/s/ R. H. Walker
R. H. Walker, President

General Counsel alleges that by that memo Respondent violated Section 8(a)(1) and (5) of the Act. I agree. By communicating directly with the employees', soliciting employees to refuse to honor a strike, if one is called, and advising its employees to resign from the Union to avoid a fine, Respondent engaged in violative conduct.[6]

(c) *Was the strike an unfair labor practice strike at its inception:*

Although, as indicated above, the Respondent engaged in an unfair labor practice on the day before the employees struck, the record contains no evidence that that unfair labor practice contributed to the strike.[7] In fact, the evidence which I credit demonstrates that the strike was caused by the Respondent's failure to agree to a contract. Employee witnesses who attended the August 18 union meeting and were asked about that meeting testified that they were told by the Union that the strike would be an economic strike. There was no evidence indicating that Respondent's August 16 memo to employees was mentioned or that it constituted a contributing factor. Therefore, I find that the strike was, at its beginning, not an unfair labor practice strike.

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6. *Lehigh Lumber Co.*, 230 NLRB 1122, fn. 1.

7. Compare, *Larand Leisurelies, Inc.*, 213 NLRB 197, fn. 4.

(2) *Allegations Regarding Activities During the Strike*:

(a) *Section 8(a)(1) allegations*:

1. *Allegations regarding Robert Walker*:

(i) *Threat not to reinstate*:

Cathy Becquet testified concerning some conversations she had with Plant Manager Walker regarding her returning to work after the strike began. Becquet testified that on September 12, 1979, she called first Plant Superintendent Kenny Atkisson and then President Walker regarding returning to work. Regarding her conversation with Mr. Walker, Becquet testified that she identified herself and told Mr. Walker that she would like to come back to work. Walker told her that he didn't want to take her back, that he did not like the business with the scab list.[8] Walker told Becquet that he would check with his lawyer and see if he had to take her back. Becquet told Walker she did not think she had done anything wrong and needed to come back to work. Walker said that he did not want any union officers or committeemen and a few other people back in the plant.[9]

Pursuant to Walker's instructions, Becquet called Mr. Walker back on September 14. At that time, Walker told her that he was not taking her back to work and that she could take whatever action she wanted. Walker said that he had not gotten in touch with his lawyer but that he

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8. Becquet, and some of the other employees on the picket line, prepared a list of employees that had crossed the picket line and reported to work, and posted that list of employees on a board which was placed on the picket line.

9. Becquet had served as an alternate on the Union's negotiation committee and had been present during the negotiation and bargaining session.

had decided that he was not going to take Becquet back. Becquet asked about a discharge slip so she could draw unemployment and Walker told her that he couldn't give her a paper, that he did not want her to draw unemployment. Walker told her that she had quit when she went out on strike. Walker said he was not going to take any of the union officers back again. Walker told Becquet that she was one of the ringleaders in the Union and that she was trying to break him or that they were trying to break him.

On September 23, after Becquet mailed Respondent a certified letter requesting reinstatement, Walker phoned her home. Walker told Becquet that she had placed him in an awkward position and that he had to take her back to work. Walker told her that she could come in on the second shift as a trim press operator and that she was to mind her own knitting. Walker also told Becquet that her seniority would start the following day when she reported to work—September 24.

Mr. Walker admitted telling Ms. Becquet that he did not want to take her back if he didn't have to. Walker also admitted that he told Ms. Becquet that he did want to take her back because she was involved in the incident regarding the sign which listed the names of those people who had crossed the picket line and returned to work.

I find Ms. Becquet to be a straightforward witness. In view of her testimony, and Mr. Walker's admission, I shall credit her testimony in full. I find Walker's statements to Ms. Becquet constitute threats to not reinstate employees because of the employees' union activities. I also find Mr. Walker's comment to Ms. Becquet that she was to mind her own knitting when she returned to work constitutes a violation of Section 8(a)(1).

Mr. Walker testified that the comment regarding Ms. Becquet minding her own knitting was intended as a warn-

ing to her not to get involved in other peoples' business and had no reference to union activity. However, I note that that comment was made in a context which would tend to give the impression to any reasonable person that Mr. Walker was referring to Ms. Becquet's union activities. Mr. Walker had on three occasions informed Ms. Becquet that he was unhappy with her because of her activities on the picket line and because of her other activities on behalf of the Union. Nothing was said in any of those conversations about Ms. Becquet interfering with other peoples' business. Therefore, I find that that activity also constitutes an 8(a)(1) violation.

(ii) *Threat to bust the Union:*

Wendell Pigg testified that while he was on strike, some two weeks after the strike began, he came in the plant to pick up his check. As he was picking up his check, he had a conversation with President Walker. Walker told Pigg that he would like for him to come back to work, that Pigg had done a good job in the past and that Walker was satisfied with his work. Pigg replied that he wasn't planning on coming back until things were settled. Walker then told Pigg that "he would—he was—he had like to, or something to that nature, get rid of the Union—let me think and some of the people in the Union. He said that if he did get rid of it he would like to run the company the way he had seen fit, or the way he would like to, and if the people that was working there wasn't satisfied that we could get a petition to get another Union and if we would like to. He said he would like to run it for at least a year."

When Robert Walker was questioned regarding Pigg's testimony, he testified that he didn't recall making any specific statement to Pigg to the effect that he was trying to bust up the Union. Mr. Walker testified that he would

not have meant to put something in that kind of context. Then Walker went on to say, "Of course, I would say that I sat out as best I could once the strike started—we did want to win."

In view of Mr. Walker's testimony in this regard, I shall credit the testimony of Wendell Pigg, whom I found to be a straightforward, candid witness. I find that Walker's comments to Pigg constituted violations of Section 8(a)(1) of the Act.

(iii) *Promised higher wages*:

Stanley Galbraith testified about a conversation with Mr. Walker at the plant which, in his affidavit, he recalled as occurring on September 7. Galbraith testified that he went in to pick up his check and Mr. Walker told him that he would like for him to come back to work. Walker stated that they were going to make some changes and streamline the place of business, and that if Galbraith came back, they would give him a merit raise plus what was offered and that would bring him up to $4 an hour. Galbraith testified that Walker told him the employees under 45 days would be dismissed and there would be some other people replaced. Galbraith testified that he was making $3.45 an hour when the strike started.

I find Mr. Galbraith to be a straightforward witness and I credit his testimony in this regard. I find that Mr. Walker's comments to him constitute a violation of Section 8(a)(1) by offering higher wages as an inducement to abandon the strike.

(iv) *It was in no hurry to negotiate and close the plant*:

Ricky James testified that while he was on strike, he went back to the Company and talked to Mr. Walker

around the first week of October. James testified that Mr. Walker asked if he and Jimmy Skinner (who was also present) knew anything about the barn burning and the tire slashing. According to James, Mr. Walker told them that he was not in a great hurry to start back negotiating because the economy was slow and he already had enough people back to run the production that he needed to run. James testified that he believed that Walker said that if he had to hire everybody in the Union back, he was in no hurry to start back the negotiations. Walker told Skinner that he could come back the next day, but as to James, Walker said there were some circumstances that made it look like James did have a lot to do with harassment, the barn burning, the tire slashing and the harassment out there on the picket line. James testified that later during the conversation Mr. Walker said that ever since Gary McClendon came in as union president, he had tried to run the Company and Walker said that he was not going to let McClendon run his Company; if he had to let him, he would shut the door.

Robert Wells testified that while he was working at the plant, about two or three weeks before the October 19 election, he attended a meeting conducted by President Walker. Wells testified that Walker told them that if the Union were voted back in before negotiations could resume, there would have to be something done about the tire slashing, the molten metal spilled on the floor and the barn burning.

I find both James and Wells to be straightforward witnesses and I credit their testimony. I find Mr. Walker's comments regarding negotiations if he had to rehire employees from the Union and his threat to shut down the plant because of interference from the Union's president constitute a Section 8(a)(1) violation as alleged by General Counsel.

(v) *Lost seniority*:

When Cathy Becquet returned to work, she was told by President Walker that her seniority would start on the day of her return, September 24, 1979. As indicated below, I credit the testimony of Ms. Becquet in this regard. Respondent offered no explanation as to why a striking employee should be penalized by loss of seniority upon her return to work during the strike. Under the circumstances, I find in agreement with General Counsel that Mr. Walker's comments to Cathy Becquet constitute violation of Section 8(a)(1) of the Act.

(vi) *Employees could not return to work until after the election*:

David Shearin testified that during the strike he went into the plant toward the end of September. Shearin testified that while he was there, Mr. Walker told him that Respondent would be hiring again after the election.

Michael Brewer testified that he received a notice from the Company indicating that he had quit to return to school. Brewer went into the plant and talked to Mr. Walker. Brewer told Walker that he had not quit to return to school. Walker told him not to worry about it, that it was a form of bookkeeping. Walker said that he did not have any work for Brewer at that time, but that he would contact Brewer if he had work on a part-time basis. Brewer testified that a few days before that conversation Walker told him that he didn't have any work, but that Brewer was to call him after the election. Brewer testified that he attempted to vote in the October 19 election but that his vote was challenged by Respondent.

Dewey Rowe testified that he talked to Mr. Walker at Walker's home about two weeks before the election concerning Rowe's returning to work. Rowe testified that

he asked Walker for his job back. Walker told him that after the 19th[10] he could have his job back. According to Rowe, Walker went on to tell him that the ones who stirred up trouble on the line, he wasn't planning on taking them back.

The above comments by Mr. Walker clearly give the impression to employees that employment was being withheld pending the October 19 decertification election. Such an impression was corroborated by Respondent's challenge to the ballot of Michael Brewer. By those comments, Respondent was holding out to strikers that either their future employment was conditioned upon the outcome of the election or that employment was being withheld until following the election, in order to permit Respondent to limit the number of employees eligible to vote in that election. Therefore, I find that Respondent's comments tended to coerce employees in the exercise of Section 7 rights and are therefore violative of Section 8(a)(1) of the Act.

(vii) *Removing picket signs*:

Paul Rowe testified that he was manning the picket line on April 15, 1980. Rowe testified that he had left the picket line and returned to see that the picket signs were in order. As Rowe drove up to the line, he saw Robert Walker with one picket sign under his arm and pulling up the second picket sign. When Walker pulled the sign up, he looked and saw Rowe. Walker walked over with the picket signs and threw them in the back of Rowe's truck. Rowe got out and asked Mr. Walker if he was going to put the picket signs back. Walker walked over and pulled up a third sign and threw it into Rowe's truck. Rowe then said, "I guess you know

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10. The election was held on October 19, 1979.

you are going to put my signs back." Walker replied, "Paul, if you want your damn signs put up, you put them up."

Rowe also testified as to an incident he recalled occurring on April 25, 1980. Rowe testified he had left the picket line, but he circled the block and came back. When he drove up, he observed John Walker grabbing the picket signs and running into the plant with the signs.

Robert Walker admitted that he had pulled up the picket signs on the occasion recalled by Paul Rowe. Walker testified that he removed picket signs in order to let some boys who were mowing the right-of-way area, where the picket signs were staked, complete their mowing. According to Walker's testimony, he told Rowe that "you're lucky I don't take them up and tear them up every night." Walker admitted that he threw the signs in Paul Rowe's truck and did not replace them where they [were] (sic) originally staked on the right-of-way property with (sic) joined property owned by Respondent.

John Walker did not testify.

I find the evidence supports General Counsel's allegations regarding both Robert Walker and John Walker removing picket signs. I find that that activity on the part of Respondent tended to interfere with employees' rights and is therefore violative of Section 8(a)(1) of the Act.

(viii) *Surveillance*:

Employees Paul Rowe and Karen Wells testified that they observed Robert Walker drive by the union hall on several occasions on Sunday afternoon when union meetings were being conducted around 4 p.m. Wells testified that she attended most of the union meetings and that on practically every occasion she has seen Walker drive by around the time the meeting was being conducted. Wells

testified that on one occasion she observed Walker drive past the hall on three different occasions during the same union meeting.

Robert Walker admitted that he has driven by the union hall on Sundays and has observed employees there for, what he believed to be, union meetings. Walker was asked what reasons he had for driving by the meetings and he testified that it just happened that his son lives down Route 2 and that the street passing the union hall is a "pretty good ways for me to go if I want to go out there and see (my son)." Walker admitted that he knew when the union meetings were held. Walker offered no explanation as to why it was necessary to drive by the union meeting on three occasions on the same Sunday during a union meeting.

In determining this particular issue, I credit the testimony of Karen Wells and Paul Rowe, both of whom I found to be straightforward witnesses. I find Robert Walker's testimony does not adequately explain, or support, his basis for driving past the union hall during union meetings on such numerous occasions. I find that his activities in that regard tend to interfere with employees' Section 7 rights and constitute violation of Section 8(a)(1) of the Act.

2. *Allegations regarding Kenny Atkisson:*

(i) *Informed employees they would not be allowed to return to work until after the election:*

Alfred W. Jett testified that while he was on strike around October 10, 1979, he talked to Kenny Atkisson about returning to work. Jett testified that Atkisson told him that everything was slack and that everybody would be back to work as of the 19th of October. Atkisson was

not called to testify. Therefore, I credit the testimony of Mr. Jett.

[In] (sic) view of my findings above regarding the similar comments made by Robert H. Walker, I find that Mr. Atkisson's comments constitute a violation of Section 8(a)(1) of the Act.

3. *Allegations regarding Joe Wakham:*

(i) *No more contracts:*

Herman Sparks testified that he was out on the picket line during September when Supervisor Joe Wakham came out to the picket line. Wakham asked Sparks to help him pick up "nails or tacks or whatever." Wakham asked Sparks, "Why don't you boys come back to work?" Sparks replied that they couldn't come back until they had a contract. Sparks testified that Wakham told them, "You may as well come back, there won't be any more contracts." Sparks testified that he told Wakham that he felt they should get one. Wakham again responded that "there won't be" and then he went into the plant.

Wakham did not testify. Therefore, I credit the testimony of Sparks. I find that Wakham's comments to him constitute a violation of Section 8(a)(1) of the Act.

4. *Allegations regarding Buford Agent:*

Herman Sparks testified that he returned to work around September 28, 1979. On the day Sparks returned to work his assistant foreman on the second shift, Buford Agent, talked to him at his machine. Sparks testified that Agent told him that after the Union got out, they were going to have a good place to work. Agent did not testify. Therefore, I credit the testimony of Sparks. I

find that Agent's comments to Sparks constitute violation of Section 8(a)(1) of the Act.

(b) *Section 8(a)(3) allegations:*[10a]

1. *The probationary employees:*

On September 4, 1979, Respondent, through Robert Walker, mailed the following letter to all its employees who had not completed their probationary period and who had not returned to work since the Union's August 18 strike:

September 4, 1979

TO: All Walker Die Casting Employees who have not completed their probationary period and who have not returned to work since the union's strike against the Company began on August 18, 1979:

Due to the present general economic conditions, the Company is cutting the number of people on the workforce. Therefore, effective September 5, 1979, the Company is terminating the employment of all members of the workforce who have not completed their probationary periods and who have not returned to work since the strike began.

10a. Although the following incidents are alleged as both Sections 8(a)(3) and 8(a)(1) violations, the primary basis upon which General Counsel rests his claim of motivation as to most of the alleged discriminatees is the fact that those alleged discriminatees did not report to work during the strike. Therefore, technically an argument could be advanced that those matters involved only alleged Section 8(a)(1) violations. However, the strike was called by the Union. Therefore, I have extended my findings to include finding both Section 8(a)(3) as well as Section 8(a)(1) violations on the determination that by honoring the union sponsored strike, the employees were engaged in union activity.

If you are among these people terminated, you may apply for re-employment as permanent replacements for other employees who have not returned to work.

Sincerely yours,

Walker Die Casting, Inc.
/s/ Robert H. Walker
Robert H. Walker
President
Encl. - Separation Notice

General Counsel alleges that by terminating its probationary employees on September 4, 1979, Respondent violated Section 8(a)(3) of the Act.

It appears from the September letter itself that Respondent is directing its action to all of those employees that observed the Union's strike. That assumption is borne out by documents submitted into evidence by Respondent which indicate that all the probationary employees except employee Charlie R. Williams was terminated through Respondent's September 4 letter.[11] The document indicates that Charlie R. Williams returned to work on August 30, 1979. Williams was not terminated.

The record reflects that even though Respondent terminated the probationary employees by its September 4 letter, there was work available in the plant. In fact, several employees, including Wendell Pigg, Karen Wells and Robert Wells, testified that during that period of time they were being asked by representatives of Respondent, including Robert Walker, to return to work. Moreover, Respondent offered no evidence demonstrating

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11. Uncontested evidence demonstrates that Respondent terminated probationary employees Dickie Adkins, Lacon Crossland, Sam Cook, Michael Cross, Robert Hayes, Michael Holder, Larry Jones, Jimmy Prince, Larry Peters, E. W. Woodward and David Wentzell on September 5, 1979.

that it had a sound business reason for terminating the probationary employees on September 4.

Therefore, I find that Respondent violated Section 8(a)(1) and (3) of the Act by terminating all its probationary employees who had not returned to work prior to September 4, 1979.[12]

2. *Cathy Becquet*:

Cathy Becquet testified that she went out on strike with the other employees on August 18. At the time of the strike she was an alternate on the negotiation committee and was shop steward in the zinc department. Becquet testified that she attended all the negotiating sessions with Respondent.

On September 12, Ms. Becquet called plant superintendent Atkisson and asked if she could return to work. Atkisson responded that they didn't need her then and that she should check back with him on Friday. Becquet then immediately called Mr. Robert Walker[13] and told him that she wanted to return to work. Walker told her that he had talked with Atkisson and that he did not want to take her back. Walker told her that he "didn't like that business with the scab list, and that he was going to check with his lawyer to see if he had to take Becquet back." Walker also told Becquet that he didn't want any union officer or committeeman and a few other people back in the plant.[14]

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12. See *Freezer Food, Inc.*, 249 NLRB No. 45; *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *National Seal, Division of Federal-Mogul-Bowen Bearings, Inc.*, 141 NLRB 661 (1963), enforcement denied 336 F.2d 781, 57 LRRM 2452 (C.A. 9, 1964).

13. Several of Becquet's conversations with Walker were also considered, *supra*, under the section dealing with Section 8(a)(1) allegations.

14. Becquet and several other employees on the picket line prepared a board which listed all the employees that had crossed the picket line and returned to work.

Pursuant to Mr. Walker's instructions, Becquet called back on Friday, September 14, and talked to Walker. Walker told her that he was not taking her back. Becquet asked if she could get a discharge slip so that she could draw unemployment. Walker responded that he didn't want her to draw unemployment. Walker then told Becquet that she had quit when she went out on strike. Walker said that he was not going to take any of the union officers and committeemen back again. He said that Becquet was one of the ringleaders in the Union and that she was trying to break him, or that they were trying to break him.

Subsequently, Becquet sent Respondent a certified letter stating that she was willing to return to work unconditionally.

On September 23, Mr. Walker called Becquet at her home and told her that she had put him in an awkward position and that he had to take her back to work. Walker told her that she could come in at 3:30 on September 24—the second shift. Walker told her that she would be getting a 32¢ per hour increase plus 20¢ shift preference and that seniority would start on September 24. Becquet asked Walker how long she would be on the second shift.[15] Walker told her maybe after the election in October; if there was an opening on days, they would talk about switching her to the first shift. Becquet testified that she asked him why she was on the second shift, why she couldn't work days because she had five children and

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15. At the time of the strike Becquet was assigned to the first shift. Although General Counsel alleged that Becquet was assigned more onerous conditions of employment on September 24, I find that General Counsel proved that allegation only as to Becquet's employment without benefit of her prior seniority. Even though Becquet was assigned to the second shift, General Counsel did not prove the availability of work on the first shift for Becquet on September 24.

it was really difficult for her to work second shift. Becquet told Walker that she had been on the day shift for three years. Walker told her that he had no openings and that he was offering her the second shift if she wanted that.

Becquet testified that when she received her first check, she received the additional 32¢ per hour plus the 20¢ shift differential plus an additional 10¢ for being present each work day.

On November 2, Becquet was told that her father had suffered a stroke while in California. On November 3, Becquet requested her vacation and a leave of absence beginning November 7 for the purpose of going to her father in California. Becquet was told by Plant Superintendent Atkisson that he would have to check with Mr. Walker.

On Monday, November 5, and Tuesday, November 6, Becquet attempted to contact Atkisson regarding her request for time off. However, on each of these occasions Atkisson was not in the plant. On November 6, Becquet checked with Assistant Plant Superintendent Lynn Chewning. Becquet talked with Chewning twice on that day. On the second occasion, according to Becquet's testimony, Chewning told her that she could go ahead and go, that he would work it out when she got back. As Becquet was leaving, she reminded her foreman, Wesley Lang, that she wouldn't be there the next day. Lang responded that he had heard that she was going on a leave of absence. Lang said that he hoped Becquet's father would be all right.[16]

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16. Testimony of Becquet concerning her conversation with Atkisson and Lang stands unrebutted. Neither Atkisson nor Lang testified.

Becquet returned home from California on Thanksgiving evening. She discovered that attached to her paycheck, which her husband had picked up at the plant on November 16, was a dismissal slip.

Becquet went to the plant the following Tuesday, November 27, and talked with Plant Superintendent Atkisson. Becquet asked Atkisson why she had been fired. Atkisson told her "that there was a different work situation in the plant at that time; when I left they had plenty of work, and when I came back they didn't have any work, they had lost a lot of orders and contracts, and that they were contemplating a layoff." Becquet then asked Atkisson why she hadn't been laid off and didn't her seniority count. Atkisson responded that that was the way Mr. Walker wanted it. Becquet told Atkisson that she had checked with Lynn Chewning because Atkisson was not there and that Chewning had told her to go ahead and go. Atkisson told her that she should talk to Mr. Walker about that. Atkisson then commented that she had been a good worker and that he would give her a good reference.

Becquet then went to see Mr. Walker. She asked Walker why she had been fired. Walker told her that she did not get permission to leave, that he had checked with everyone and that no one had given her permission to leave. Becquet then asked if he had checked with Lynn Chewning. Walker told her no, but that he would talk with Chewning. He then asked Becquet to leave the office.

Becquet was called back in the office a few minutes later. Becquet asked what Mr. Chewning had said. Walker said that Chewning said that he did not give Becquet permission to go. Walker told her that it would have to stand the way it was. Becquet then asked Walker about going back to work or getting a layoff slip. Walker

told her that he did not want her drawing unemployment on him. Walker said something about her husband not being able to work in this area and asked why didn't she move to California.

In considering the merits of the allegations that Becquet was discharged in violation of Section 8(a)(3), I credit her testimony. In determining to credit Ms. Becquet, I was impressed with her demeanor. As to conflicts between her testimony and that of Respondent's witnesses, I note that Plant Superintendent Atkisson did not testify. Therefore, her testimony regarding conversations with Atkisson stands unrebutted. In regard to conflicts with Ms. Becquet and President Robert Walker, I find Walker's testimony in that regard to be incredible. I find particularly incredible Walker's testimony as to the reasons why Becquet was discharged around November 16. In that regard, Mr. Walker testified that Plant Superintendent Atkisson told him that Ms. Becquet said she wanted a leave of absence to go to California to be with her father who was ill. Mr. Walker testified that he and Mr. Atkisson discussed the matter and decided to grant Ms. Becquet the leave of absence. However, according to Walker, Becquet was discharged because she left on her trip for California without contacting Mr. Atkisson. Walker went on to testify that they felt that if they permitted Becquet to leave without checking back with Atkisson, they would have set a precedence. Mr. Walker's version of the events does not explain why Respondent could not get word to Becquet on either Monday or Tuesday, following her request for a leave of absence, that that leave of absence had been granted. Under the evidence available to me, it is uncontested that Atkisson was not in the plant while Becquet was present on either Monday or Tuesday. Obviously, under those circumstances, Atkisson was well aware that it was impossible for Becquet to personally

contact him. No explanation was offered as why Atkisson, under the circumstances, did not simply leave word for Ms. Becquet that her leave had been approved. Therefore, I am convinced that Walker's testimony that they discharged Becquet because she failed to check back with Atkisson is not worthy of belief.

As to the conflicts between Ms. Becquet's testimony and the testimony of Assistant Plant Superintendent Lynn Chewning, Mr. Chewning admitted that Ms. Becquet asked him on several occasions, including the day before she left for California, whether her request for a leave of absence had been approved. Mr. Chewning testified that in circumstances like that regarding Ms. Becquet, he would "probably state that it would be OK with me, but she would have to check with either Mr. Walker, or Kenny Atkisson." He was asked if that was what he said to Ms. Becquet and Chewning responded, "I presume it was." On cross-examination, Chewning testified that he could not recall whether Mr. Atkisson was present in the plant on those occasions when Ms. Becquet asked Chewning if her leave of absence had been approved. Mr. Chewning testified that he did not have authority to grant a leave of absence, but he also testified that during Atkisson's absence from the plant he took over Mr. Atkisson's duties and responsibilities. Therefore, as in the case of Mr. Walker, I find Mr. Chewning's testimony incredible. If Plant Superintendent Atkisson was not present, and the unrebutted testimony is to the effect that he was absent, the normal thing for Mr. Chewning to have done would have been to go to whatever sources he needed to contact, either Mr. Walker or Mr. Atkisson, and secure an answer to Ms. Becquet's question about approval of her leave. No explanation was offered as to why this was not done. Additionally, I note that there is a conflict between the testimony of Mr. Chewning and Mr. Walker. According

to the testimony of Mr. Chewning, Cathy Becquet's request for a leave of absence was not approved. However, Mr. Walker testified that the matter had been approved Therefore, I find that I cannot credit the testimony of either Mr. Walker or Mr. Chewning to the extent that their testimony conflicts with that of Ms. Becquet.

In determining the allegation regarding Cathy Becquet, I notice that when she was reinstated, pursuant to her request, on September 24, she was informed that her seniority would only run from that day—September 24, 1979. Respondent offered no business justification for treating Ms. Becquet as a new employee regarding seniority. Under the circumstances, I find that Ms. Becquet was denied proper reinstatement[17] even though she was placed back to work on September 24, due to her participation in the strike which began on August 18. Therefore since Ms. Becquet was never properly reinstated, she was entitled to full remedies as a Section 8(a)(3) discriminatee from September 12, 1979.

Additionally, I find that Ms. Becquet's discharge on or about November 16, 1979, was due to her union activities. The circumstances convinced me that Respondent's asserted bases for her discharge was pretextual. In that regard, I notice that representatives of Respondent gave conflicting opinions as to the basis of Ms. Becquet's discharge.[18] Plant Superintendent Atkisson informed Ms. Becquet that she was discharged because during her absence there had been a reduction in available work and she was no longer needed. However, President Walker

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17. In view of my finding below that the strike was converted to an unfair labor practice strike on August 27, Becquet was entitled to immediate reinstatement from September 12, the date of her unconditional offer. Becquet should have been reinstated without loss of seniority. (*N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 2 LRRM 610 (1938).)

18. *Clock Restaurant No. Seventeen*, 212 NLRB 423.

testified that Ms. Becquet was discharged because she failed to recheck with Plant Superintendent Atkisson in order to determine whether her request for a leave of absence had been granted. Moreover, under the circumstances set out in the testimony of Mr. Walker, I find the evidence convincing that Mr. Walker's testimony did not reveal the true reason why Ms. Becquet was discharged. I am unconvinced that no valuable employee, like Ms. Becquet, would be discharged for failing to recheck with the Plant Superintendent regarding a request for a leave of absence under the circumstances present in her case. The record stands uncontested that Mr. Atkisson was not present during the last two periods Ms. Becquet worked prior to leaving for California. It was apparent to Atkisson and Walker that Ms. Becquet had a real need to leave during the time requested. It was also apparent that Atkisson could have easily left word with Mr. Chewning or any other official that Ms. Becquet's leave had been approved.

In view of my findings that conflicting versions were given as the basis for Ms. Becquet's discharge, and my findings [that] (sic) the bases asserted were pretextual, I am convinced, and find, that the true reason why Ms. Becquet was discharged was her union activities.

3. *The refusal to reinstate*:

Complaint alleges that certain employees listed below on Appendix "A" made unconditional offers to return to work, but that Respondent has failed and refused to reinstate those employees.[19]

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19. By amendment near the close of the hearing, General Counsel expanded his allegation in paragraph 16 of the Amended Consolidated Complaint to include all employees listed on General Counsel Exhibit 11 (a compilation of unconditional offers received by Respondent). Additionally, by that amendment, General Counsel alleged that the Union made an unconditional offer to return all strikers by letter dated February 11, 1980.

The evidence supports General Counsel's allegation as to specific employees mentioned in G.C. Exh. 11 plus employees Cathy Becquet and Michael Wayne Brewer.[20] Additionally, all striking employees were entitled to reinstatement upon the unconditional offer made on their behalf by the Union on February 11, 1980.[21]

In view of my findings below that the strike was converted to an unfair labor practice strike on August 27, 1979, each striking employee is entitled to immediate reinstatement upon an unconditional offer to return to work. The evidence indicates that many of the employees who unconditionally offered to return have not been reinstated. In that regard, striking employees are entitled to preference in employment over persons employed on or after the date the strike was converted to an unfair labor practice strike.[22]

Therefore, I find that those employees listed on Appendix "A" who were denied proper or timely reinstatement were deprived of their rights in that regard in violation of Section 8(a)(3).[23]

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20. As to Becquet and Brewer, see footnotes on Appendix "A", below.

21. Of course, each striking employee is entitled to reinstatement on the basis of the earliest unconditional offer made by him or on his behalf.

22. *Mastro Plastics Corp., et al. v. N.L.R.B.*, 350 U.S. 270, 37 LRRM 2587 (1956).

23. Respondent discharged a number of striking employees on the assertion that those employees were, according to Respondent's information, employed by another employer during the strike. Although not specifically allleged as violative of Section 8(a)(3), that issue bears upon the allegation of refusal to reinstate. In order to justify the discharge of striking employees, the Employer has the burden of establishing legitimate and substantial business justification for its action. "[U]nless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justification,' he is guilty of an unfair labor practice. *N.L.R.B. v.*

(Continued on following page)

(c) *Section 8(a)(2) allegations:*

Wendell Pigg testified that in a meeting before the October 19 election Robert Walker told the employees at that meeting that he would like to try running the plant with a committee to take care of the problems they would have and that he would like to try that for one year and then if the people were not satisfied, that he would agree to a petition for another union. Pigg also testified that Walker said that the committee would be made up of some employees there inside the plant and that any of the problems brought up would be brought up before them (the committee) and that they would take care of it.

Pigg testified that a committee was established some four to six weeks prior to June 16, 1980—the date he testified at the hearing herein. Pigg testified that one of the employees on the committee was Johnny Flippen, an employee that works with Pigg.

On December 19, 1979, Respondent posted a notice to employees in its plant which stated, in part:

12-19-79

TO: OUR EMPLOYEES
FROM: R. H. WALKER

Immediately upon our return to work on January 2, 1980, we will begin discussing how to set up represen-

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Footnote continued—

Great Dane Trailers, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer." *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967). See also *Bromine Division, Drug Research*, 233 NLRB 253, 261 (1977). No Probative evidence was offered in justification of Respondent's discharge of those employees. Therefore, I find that those persons retain their status as employees and, if they were included as strikers who made, or upon whose behalf the Union made, an unconditional offer for them to return to work, are also entitled to immediate and full reinstatement.

tation for our employees and procedures to handle grievances. You will recall a notice posted on the bulletin board on October 11, in which we said "it will be up to our employees as to how representation and grievance procedures may be set up and handled after the election."

Please be thinking about how you would like to see this done. The Company feels if we have the input of everyone we can work out an organization which will be efficient and fair for all of us.

R. H. Walker

On May 9, 1980, Respondent posted another notice to employees which stated as follows:

HOTLINE!

May 9, 1980

TO: OUR EMPLOYEES
FROM: R. H. WALKER

We are now setting up a temporary grievance procedure which we plan to use until our lawyer advises we can set up a permanent, more formal, grievance procedure without risk of committing an unfair labor practice. The following employees have agreed to serve as the temporary grievance committee:

Johnny Flippen — Walter George
Steve Wakham — Allen Goodrich
Vivian Whitworth

This committee has elected Johnny Flippen, Chairman; Walter George, Vice-Chairman; and Vivian Whitworth, Secretary. Kenneth Atkisson, Lynn Chewning, and R. H. Walker are working with this committee to set up the procedure which we will use to process grievances.

We will continue to operate, as we promised, according to the rules and procedures of the old contract, as modified by the Company's last offer to our employees. All members of the grievance committee have copies of this and we have copies in the office for anyone desiring one. As soon as we have the temporary grievance procedure worked out, we will prepare copies of it, as well as our rules and other procedures, and distribute one copy to each employee.

/s/ Robert H. Walker

Then, on June 6, 1980, Respondent distributed the following notice to employees:

June 6, 1980

TO OUR EMPLOYEES

With the checks which you receive today, we are enclosing a copy of our Temporary Grievance Procedure. Your Company wants to know your grievances, problems or complaints so we may take action to rectify them or prevent them from happening again. It is the feeling of your Company that the Temporary Grievance Procedure is an additional means which will help to make it easier for you to let us know what your problems, complaints and grievances are or may be. We hope very much that you will always let us know what problems exist for we cannot correct a problem we are not aware of. You can be sure that we will do our best to correct and rectify problems, grievances and complaints and continue to strive to make Walker Die Casting the best place to work which can be found.

/s/ Robert H. Walker
Robert H. Walker, President

Walker testified that the above June 6, 1980 notice was distributed to employees with their paychecks.

Robert Walker testified that the employee members of the grievance committee were asked to serve on that committee by him. Walker testified that the committee has held a number of meetings and that in addition to the members of the committee, Assistant Plant Superintendent Lynn Chewning and he (Robert Walker) were present at the meetings. Minutes of the meetings were typed by Respondent's receptionist. Walker testified that members of the committee were paid for the time they spent in committee meetings.

Walker admitted that employee complaints were brought up during this meeting and matters relating to employees' working conditions were discussed. Walker testified that some of those problems relating to employees' working conditions were remedied as a result of steps directed by supervision, following discussing of those problems during committee meetings. During one of the committee meetings, matters relating to employees' vacations were discussed and a procedure was established whereby an employee could take extra days of vacation whenever a week's notice was given.

I find that, in accord with the above evidence and the record as a whole, Respondent did recognize and bargain with the committee of employees established by it. The committee was established around May 9, 1980, and the evidence indicates that Respondent has continued to recognize and negotiate with the committee since that time. I find in agreement with General Counsel that Respondent's actions in that regard constitute a violation of Sec-

tion 8(a)(2) of the Act.[24] In view of evidence that there were no negotiations between the Union and Respondent after September 11, 1979, and my finding below that Respondent was obligated to continue to recognize the Union, I find in agreement with General Counsel's complaint allegation that Respondent also violated Section 8(a)(5) by unilaterally implementing the Employee Committee.

(d) *Section 8(a)(5) allegations:*

(i) *Withdrawing its last offer:*

By memo dated August 20, which Robert Walker posted on the bulletin board and mailed to all striking employees, Respondent notified employees of the details of its last contractual offer, suggested that the employees should inform the negotiaitng committee if they felt Respondent's offer was reasonable, and offered to pay any employee that reported to work the new wage rates proposed by the Company.

On August 27, 1979, Respondent sent the following letter:

August 27, 1979

Mr. Gary McClendon, President
Local No. 259, Stove, Furnace and
Allied Appliance Workers' Union
RFD #2
Cornersville, TN 37047

Dear Mr. McClendon:

The final proposal which was made to you and the members of your negotiating committee on August

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24. *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 44 LRRM 2204 (1959); *The Carpenter Steel Co.*, 76 NLRB 670 (1948); *Walgreen Magnetics*, 132 NLRB 1613 (1961); *Thompson Ramo Wooldridge, Inc.*, 132 NLRB 993 (1961); *Oil Transport Co.*, 182 NLRB 1016 (1970); *Sound Technology Research*, 221 NLRB 496 (1975), enforced 81 LC ¶ 13013 (C.A. 9, 1977).

17, 1979, was contingent on acceptance of that offer without a work stoppage.

Since Local 259 elected to reject that offer and calls a strike on August 18, 1979, the Company's last offer is hereby withdrawn.

Yours truly,

Walker Die Casting, Inc.
/s/ Robert H. Walker
Robert H. Walker
President

RHW: ec

cc: Ray Sullivan

General Counsel alleged by withdrawing its last offer on August 20, Respondent violated Section 8(a)(1) and (5). I agree with General Counsel. While Respondent's obligations under Section 8(a)(5) are limited, both the Courts and the Board have continuously held that employers have an obligation to negotiate in good faith. The parties negotiated in progressive fashion throughout August. Although the employees decided to strike when the past contract expired on August 18, that act did not release Respondent from its obligation to continue to bargain in good faith. However, Respondent, by the above-quoted letter, effectively terminated negotiations.

The Board in the case of *Randle-Eastern Ambulance Service*[25] found that an employer violated Section 8(a)(5) by withdrawing all its contract proposals. In *Randle-Eastern*, the employer withdrew its proposals during a negotiation session in which it, the employer, offered to present a new proposal which would include an entire package.

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25. 230 NLRB 542 (1977), enforcement denied, in part, 584 F.2d 720 (C.A. 5).

Here, Respondent made no such offer. Respondent's letter offered nothing more than removal of its entire negotiation package—in effect, Respondent rescinded all the progress achieved during its summer negotiations with the Union. Moreover, while it rescinded the negotiation progress, Respondent made no offer to negotiate further. The record shows that as late as June 19, 1980, when this hearing closed, Respondent had not resumed negotiations with the Union.

It is true that an RD petition was filed and processed during the interval between Respondent's August 27 letter and June 19. However, that petition which was filed on September 6, 1979, was dismissed by the Region on February 7, 1980. Nevertheless, no negotiations have occurred since that date.

During the interval since February 7, Respondent formed a labor organization among its employees. (See Section 2(c), above.)

Under those circumstances, I find the evidence persuasive that Respondent, by its August 27 letter to the Union, engaged in bad faith bargaining in violation of Section 8(a)(5).

(ii) *Unilateral changes*:

General Counsel alleged that Respondent unilaterally implemented a wage increase in excess of those offered during negotiations. Undisputed evidence supports that allegation.

As indicated above in Section 2(a)(1)(iii), I found that Respondent violated Section 8(a)(1) by offering striking employees higher wages as an inducement to break the strike and return to work. President Robert Walker admitted that he decided to raise the starting pay to a

minimum of $4 an hour after the strike commenced on August 18, 1979. Walker testified that the increased minimum rate went into effect on September 5, 1979.

There is no dispute regarding General Counsel's contention that the $4 minimum starting rate was in excess of what Respondent offered during negotiations. Respondent, in its brief, admits that Respondent's August 14, 1979 economic proposal proposed a $3.30 per hour minimum rate. However, Respondent argues that the Union evidenced no interest in negotiating a minimum starting rate and that, in any event, the Union waived any claim of unilateral minimum rates because Respondent had during the existence of the bargaining agreement, which expired in August 1979, regularly employed new employees at rates above those set forth in the agreement. The contract provided starting rates ranging from $2.40 to $3 per hour, but Respondent regularly hired employees from $3.30 to $3.40 per hour and employed some new die casters at rates as high as $4 and $4.15 per hour approximately 30 days before the strike. The Union admittedly knew Respondent hired employees at higher rates.

President Walker, when he admitted that Respondent decided to pay $4 as a minimum starting rate, testified that he did so in order to get better employees.

General Counsel also alleged that Respondent unilaterally implemented an attendance bonus and unilaterally made the attendance bonus applicable on a weekly basis, then changing it to monthly, and back to weekly again. Respondent points out that it did propose a monthly attendance bonus of 10¢ per hour during negotiations. However, Respondent does not contest that it did implement a 10¢ per hour monthly attendance bonus after the strike which was expanded to include giving company jackets to employees who earned the attendance bonus in Decem-

ber 1979. In January 1980, Respondent began paying the bonus on a weekly basis. Neither the awarding of jackets nor the change from monthly to weekly basis of computing the attendance bonus was mentioned during negotiations with the Union.

Both the Board and the Courts have expressed concern with an employer's ability to undermine the negotiations process through unilateral changes. That concern has been voiced especially in situations involving wage increases where the increase is contemporaneous with a strike.[26] Such unilateral action is a strong indication that the employer is not bargaining with the required good faith.

I find the circumstances here particularly alarming in that regard. Upon its employees striking over the parties inability to reach a collective-bargaining agreement because of disputes involving, among other things, wages, Respondent, on August 27, withdrew completely its last proposal. Shortly thereafter, on September 5, Respondent, without further negotiations or notice to the Union, instituted a minimum wage substantially higher than its offer to the Union during negotiations.

I find little support for Respondent's arguments in defense of its unilateral actions. Although the Union had, during harmonious relations, during existence of the last agreement, permitted minimum rates in excess of the contract provisions, there is no indication that the Union intended thereby to waive its right to bargain over wages. In fact, just the opposite occurred. During August the Union and Respondent negotiated with respect to wages. Moreover, I place little significance in testimony from Respondent that the Union showed little interest in nego-

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26. See *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 52 LRRM 2174 (C.A. 2, 1963); *Trinity Valley Iron & Steel*, 127 NLRB 417 (1960).

tiating the minimum rates. Obviously, a union is more concerned from a tactical standpoint during negotiations, with first reaching agreement on the higher level of wages. Since the parties had not agreed on those higher levels, I do not find it surprising that the Union appeared uninterested in discussing the minimums. I do not view that testimony as demonstrating that the Union had no interest in negotiating minimum rates, especially since the last contract contained minimum rate provisions. Therefore, I find that the Union did not waive its bargaining rights regarding minimum wages.

No evidence was offered which would demonstrate that the Union ceased to be the exclusive representative of the unit employees.[27] Respondent, by implementing changes in its minimum rates, changing the attendance bonus system and awarding company jackets to employees that earned the attendance bonus, without first notifying the Union and offering to negotiate those items, engaged in unilateral acts in violation of Section 8(a)(5).

(iii) *Refusal to bargain since September 1, 1979:*

Respondent does not dispute that it notified the Union on September 11, 1979, that no further negotiations could be scheduled until the petition in the recently filed decertification case was resolved.[28]

The law is clear that the filing of a decertification petition is not sufficient basis to justify an employer's refusal to bargain when, as here, the Respondent's action occurred in context with unlawful conduct.[29] Respon-

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27. See Section 2(d)(iii), below.

28. See fn. 3, *supra.*

29. *Autoprod, Inc.*, 223 NLRB 773 (1976); *Lammert Industries*, 229 NLRB 895 (1977).

dent's September 11 termination of negotiations occurred in a context of numerous Section 8(a)(1) and (5) violations. As shown above, Respondent violated Section 8(a)(1) on various occasions before September 11, and Section 8(a)(5) on August 16, when it advised its employees to resign from the Union and cross the picket line. On August 27, Respondent illegally withdrew its last contract offer. On September 5, Respondent unilaterally instituted an illegal increase in its minimum wage rate. In this regard, I note that President Walker actually suggested to employees that he would like to get rid of the Union. (See pp. A23-A24, above.) "Such conduct directly affected all unit employees and could have reasonably been predicted to cause employee disaffection." *Autoprod, Inc., supra.*

No negotiations have occurred since Respondent terminated negotiations on September 11. Moreover, its subsequent illegal conduct, especially its recognition of another labor organization in May 1980, is totally incompatable with its obligation to negotiate with the Union.

Additionally, no evidence was offered which demonstrated that when Respondent terminated negotiations, reasonable grounds existed for believing that the Union had lost its majority status. *Autoprod, Inc., supra,* at 779.

Therefore, I find that Respondent, by terminating negotiations on September 11, and thereafter continuing to refuse to negotiate with the Union, violated Section 8(a)(5) of the Act.

(e) *Was the strike converted to a ULP strike:*

Under the circumstances herein, I find the evidence proves that the employees' strike was converted to an unfair labor practice strike on August 27, 1979, when Respondent withdrew its last contract proposal.

Respondent's action on that occasion and subsequently, as outlined above, seriously impeded the success of the negotiations and thus prolonged the strike and its settlement (*Randle-Eastern Ambulance Service*, 230 NLRB 542 (1977)).

Conclusions of Law

1. Respondent, Walker Die Casting, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 259, Stove, Furnace, and Allied Appliance Workers International Union of North America, AFL-CIO, and Employee Committee are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent, by threatening not to reinstate employees because of the employees' union activities; threatening employees that they were to mind their own knitting when they returned to work because of their union activities; threatening to get rid of the Union; offering wage increases in order to induce its employees to break the strike and return to work; telling employees that if it had to reinstate everybody in the Union, it is in no hurry to start back to negotiations; threatening to shut the door of the plant rather than continuing to deal with the union president; telling its employee that by returning to work after engaging in the strike, she had lost her seniority status; informing employees that they would not be considered for employment until after the decertification election; removing its employees' picket signs; engaging in surveillance of its employees' union activities; threatenng its employees that there would be no more collective-bargaining agreements with the Union; and telling its employees that they would have a good place to work once

the Union was defeated, violated Section 8(a)(1) of the Act.

4. Respondent, by discharging its probationary employees on or about September 5, 1979; by refusing to reinstate its employee Cathy Becquet on September 12, 1979, by refusing to reinstate Cathy Becquet on September 24 without loss of seniority privileges, and discharging Cathy Becquet on November 16 because of her union activities; and by refusing to reinstate its employees, who were engaged in an unfair labor practice strike, following unconditional offers to return to work by or on behalf of those employees, violated Section 8(a)(3) and (1) of the Act.

5. Respondent, by soliciting and appointing employees to an employee grievance committee, and recognizing and bargaining with the Employee Committee since on or about May 9, 1980, has dominated and interfered with the formation or administration of a labor organization in violation of Section 8(a)(2) and (1) of the Act.

6. Respondent, by advising its employees to resign from the Union; by withdrawing its last contract proposal; unilaterally changing its minimum wage rates; unilaterally changing other conditions of employment; unilaterally establishing an employee grievance committee; and by refusing to negotiate with the Union since September 11, 1979, violated Section 8(a)(5) and (1) of the Act.

7. The strike among Respondent's employees which commenced on August 18, 1979, was converted to an unfair labor practice strike by Respondent's unfair labor practices on August 27, 1979.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (2), (3) and (5) of the Act, and having found that the strike of Respondent's employees was converted to an unfair labor practice strike on August 27, 1979, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. My recommended Order will require Respondent to offer employees Cathy Becquet, Dickie Adkins, Lacon Crossland, Sam Cook, Michael Cross, Robert Hayes, Michael Holder, Larry Jones, Jimmy Prince, Larry Peters, E. W. Woodward, David Wentzell, and those employees named in Appendix "A", reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make whole the employees mentioned above for any loss of earnings they may have suffered as a result of the discrimination against them,[30] and that it post appropriate notices. Loss of backpay shall be computed and interest thereon shall be added in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Florida Steel Corporation*, 231 NLRB 651.[31]

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30. As to employees, Adkins, Crossland, Cook, Cross, Hayes, Holder, Jones, Prince, Peters, Woodward and Wentzell, backpay should run from the date of their discharge, September 5, 1979. See *Abilities & Goodwill, Inc.*, 241 NLRB No. 5. Although employee Cathy Becquet was also discharged, her backpay should be computed from September 12, 1979, when she was first denied reinstatement pursuant to her unconditional offer to return to work.

31. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[32]

ORDER

Respondent, Walker Die Casting, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining and coercing the employees in the exercise of their rights guaranteed to them in Section 7 of the Act in violation of Section 8(a)(1) of the Act by threatening not to reinstate employees because of the employees' union activities; threatening employees that they were to mind their own knitting when they returned to work because of their union activities; threatening to get rid of the Union; offering wage increases in order to induce its employees to break the strike and return to work; telling employees that if it had to reinstate everybody in the Union, it was in no hurry to start back to negotiations; threatening to shut the door of the plant rather than continuing to deal with the Union President; telling its employee that by returning to work after engaging in the strike, she had lost her seniority status; informing employees that they would not be considered for employment until after the decertification election; removing its employees' picket signs; engaging in surveillance of its employees' union activities; threatening its employees that there would be no more collective-bargaining agreements with the Union; and tell-

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32. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ing its employees that they would have a good place to work once the Union was defeated.

(b) Refusing to reinstate its employees and discharging its employees and thereafter failing and refusing to reinstate those employees because of the employees' concerted activities or union activities.

(c) Dominating, assisting and contributing to the support of, or interfering with, Employee Committee, provided, however, that nothing in this Order shall require or authorize Respondent to vary or abandon any wage, hour, seniority or other substantive benefit it has established for its employees because of the aforesaid agreement, or to prejudice the assertion by its employees of any rights they derived as a result of said agreement; and further provided that nothing herein shall be construed as prohibiting its employees from forming, joining or assisting any labor organization.

(d) Recognizing Employee Committee, or any successor thereto, as a representative of its employees concerning wages, rates of pay, hours of employment or any other terms and conditions of employment.

(e) Refusing to recognize or bargaining collectively with Local 259, Stove, Furnace, and Allied Appliance Workers International Union of North America, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the unit described below:

> All production and maintenance employees, including shipping, receiving, and tool crib employees, excluding all office clerical employees, technical and professional employees, and supervisors as defined in the Act.

(f) Unilaterally, without bargaining with, Local 259, Stove, Furnace, and Allied Appliance Workers' Interna-

tional Union of North America, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the above-described unit, changing wages or other conditions of employment or unilaterally establish an employee committee.

(g) In any other manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Offer Cathy Becquet, Dickie Adkins, Lacon Crossland, Sam Cook, Michael Cross, Robert Hayes, Michael Holder, Larry Jones, Jimmy Prince, Larry Peters, E. W. Woodward, David Wentzell, and the employees listed herein in Appendix "A", immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after August 27, 1979.

(b) Make the above-named employees whole for any loss of pay they may have suffered as a result of the discrimination against them in the manner set forth in the section of this decision entitled "The Remedy."

(c) Withdraw and withhold recognition from and completely disestablish Employee Committee or any successor thereto as a representative of its employees for the purpose of collective-bargaining, including the settlement of grievances.[33]

(d) Upon request, bargain with Local 259, Stove, Furnace, and Allied Appliance Workers' International

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33. *Sound Technology Research*, 221 NLRB 496 (1975), enforced 81 LC ¶13013 (C.A. 9, 1977).

Union of North America, AFL-CIO, as the exclusive representative of all the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours and other terms and conditions of employment.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other reports necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Lewisburg, Tennessee plant copies of the attached notice marked Appendix "B".[34] Copies of said notice on forms provided by the Regional Director for Region 26, after being duly signed by an authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

Dated at Washington, D.C. November 19, 1980

/s/ J. Pargen Robertson
J. Pargen Robertson
Administrative Law Judge

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34. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX "A"

Name	Date Unconditional Offer Received by Respondent
Cathy Becquet[1]	9/12/79
Alfred Jett	10/23/79
Dewey Wayne Rowe[2]	10/ 5/79 & 10/23/79
Michael Wayne Brewer[3]	10/17/80
Charles E. McCord	10/23/79
Ann Derryberry	10/23/79
Eddie Ward	12/ 5/79
Clyde Erwin	10/23/79
Sherry D. Willoughby	10/24/79
David Sherin	10/23/79 & 1/23/80
Chit Derryberry	10/23/79
James D. Flowers	1/10/80
Gary McClendon	11/ 1/79
Wesley Poteete	10/24/79
Sandra D. Luna	10/27/79
Jimmy Winchester	10/31/79
Raymond P. Osborne	10/31/79

1. Although Cathy Becquet is not included on Respondent's list of employees who made unconditional offers, testimony, which I have credited, shows that Becquet first unconditionally offered to return to work orally to Respondent on September 12, 1979.

2. Dewey Rowe testified that he offered to return to work about two weeks before the election. I have credited that testimony (see Section 2(a)(1)(vi) at page 11, above).

3. Michael Wayne Brewer was not listed on Respondent's list of employees who have made unconditional offers. However, the evidence, which I credited, demonstrates that Brewer talked with both Plant Superintendent Atkisson and President Walker on October 17 or 18, 1979, about returning to work after he (Brewer) had received a separation slip from Respondent. I find that Brewer's inquiry on that date constitutes an unconditional offer to return to work.

Edel Sparks	1/ 5/80
Eugene Pullen	10/23/79
Roy Rowe	10/23/79
Paul Rowe	10/23/79
James E. Stewart	10/23/79
Becky Gillium	10/23/79
William Frank Stewart	10/23/79
Margaret Neill	10/23/79
Karon Pischel Wells[4]	10/23/79
Nancy Reed	10/23/79
John Liggett	10/23/79
Stanley Galbraith	10/24/79
Marie Logue	10/24/79
Ruby Eckenroth	10/26/79
Larry S. Hopper	10/30/79
Shirley P. Metcalf	10/31/79
Nancy Diane Smith	1/10/80
Sam L. Cook, Jr.	1/10/80
Ben Porterfield	1/11/80
William F. Davis	1/11/80
Thomas R. Smith	1/11/80
Roy Garrett	1/19/80
Ronnie L. Burns	1/21/80
Wilburn Phillips	1/21/80
James Stegall	1/21/80
Chestley H. Derryberry	1/23/80
Mark Welch	1/23/80

4. Karon Pischel Wells may be the same person that testified during the hearing herein—Karen Wells. If so, the record reflects, and I find, that Mrs. Wells was terminated on October 3, 1979, pursuant to Respondent's policy (which was included in the last collective-bargaining agreement) not to employ both husband and wife. Mrs. Wells' husband, Robert L. Wells, had returned to work from the strike on September 25, and was working at the time of his wife's termination. I find that Mrs. Wells was terminated for legitimate and substantial business reasons. Therefore, if she is Karon Pischel Wells, she is not entitled to reinstatement following her October 23 offer.

William Edwin Taylor	1/23/80
Bill D. Spence	1/23/80
Eddie Ward	1/28/80
Frankie Moore	2/11/80
Wendell J. Rowe	2/12/80
Jackie Metcalf	2/22/80
Mark Welch	3/31/80
Denise Luker	2/12/80

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT threaten our employees that we will not reinstate them because of their activities on behalf of LOCAL 259, STOVE, FURNACE, AND ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or any other labor organization, or because they engage in strike activity.

WE WILL NOT tell our employees that they are to mind their own knitting because of the employees' union activities.

WE WILL NOT offer our employees higher wages in order to induce our employees to break a strike.

WE WILL NOT tell our employees that we are in no hurry to resume collective-bargaining negotiations if we have to reinstatement everybody in the Union.

WE WILL NOT threaten our employees with plant shutdown because we have to deal with the Union President.

WE WILL NOT inform our employees that re-employment will have to await a decertification election.

WE WILL NOT remove our employees' picket signs from public property.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT threaten our employees that there will be no more collective bargaining agreements with the Union.

WE WILL NOT inform our employees that they will have a good place to work once the Union is defeated.

WE WILL NOT discharge or refuse to reinstate our employees or otherwise discriminate against our employees because of their strike activities or union activities.

WE WILL NOT form, assist, dominate, or interfere with Employee Committee.

WE WILL NOT vary or abandon any wage, hour or other substantive benefit established for our employees as a result of our dealing with Employee Committee.

WE WILL NOT recognize and will completely disestablish Employee Committee, or any successor thereto, as the representative of our employees concerning wages, rates of pay, hours of employment or any other terms and conditions of employment.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with LOCAL 259, STOVE FURNACE, AND ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT unilaterally change our wage rates, or other conditions of employment, or establish an employee grievance committee without first negotiating with the above-mentioned Union as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT advise our employees to resign from the above-mentioned Union as the exclusive bargaining representative of the employees in the bargaining unit described below.

WE WILL offer immediate and full reinstatement to: Cathy Becquet, Dickie Adkins, Lacon Crossland. Sam Cook, Michael Cross, Robert Hayes, Michael Holder, Larry Jones, Jimmy Prince, Larry Peters, E. W. Woodward, David Wentzell, Alfred Jett, Dewey Wayne Rowe, Michael Wayne Brewer, Charles E. McCord, Ann Derryberry, Eddie Ward, Clyde Erwin, Sherry D. Willoughby, David Sherin, Chit Derryberry, James D. Flowers, Gary McClendon, Wesley Poteete, Sandra D. Luna, Jimmy Winchester, Raymond P. Osborne, Edel Sparks, Eugene Pullen, Roy Rowe, Paul Rowe, James E. Stewart, Margaret Neill, Karon Pischel Wells, Nancy Reed, John Liggett, Stanley Galbraith, Marie Logue, Ruby Eckenroth, Larry S. Hopper, Shirley P. Metcalf, Nancy Diane Smith, Ben Porterfield, William F. Davis, Thomas R. Smith, Roy Garrett, Ronnie L. Burns, Wilburn Phillips, James Stegall, Chestley H. Derryberry, Mark Welch, William Edwin Taylor, Bill D. Spence, Eddie Ward, Frankie Moore, Wendell J. Rowe, Jackie Metcalf, Mark Welch and Denise Luker to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges; and WE WILL make each of those employees whole for any

loss they may have suffered as a result of our discrimination against them, with interest.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including shipping, receiving, and tool crib employees, excluding all office clerical employees, technical and professional employees, and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act.

Walker Die Casting, Inc.
(Employer)

Dated ..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower, 8th Fl., 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104 (Tel. No. (901) 541-2725).

APPENDIX B

(Filed July 8, 1982)

No. 81-1194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALKER DIE CASTING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Cross-Petitioner.

ORDER

Before: KEITH, and KRUPANSKY, Circuit Judges and WEICK, Senior Circuit Judge

This matter is before the Court on the petition of Walker Die Casting, Incorporated (the Company) to review and set aside an order of the National Labor Relations Board (the Board) finding that the Company engaged in numerous violations of the National Labor Relations Act (the Act). The Board's order directs the Company to, *inter alia*, cease and desist from its refusal to bargain with Local No. 259 of the Stove, Furnace and Allied Appliance Worker's Union of North America (the Union) and reinstate, with back pay, certain former employees of the Company.[1] The Board has cross-applied for enforcement of its order.

The Company is engaged in the manufacture of zinc and aluminum castings in Lewisburg, Tennessee and the Union has represented the employees at the Lewisburg

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1. 255 N.L.R.B. 34 (1981)

facility since 1971. During early 1979 the Company requested that the Union engage in negotiations for the purpose of drafting a labor contract to replace the existing agreement which was to expire on August 18, 1979. Negotiations, however, did not commence until June 29, 1979, apparently because of the Union's failure to respond to the Company's request.

Thereafter, negotiating sessions occurred on several dates up to and including August 17, 1979. On that date the Union commenced a strike. On August 27, 1979 the Company directed a letter to the Union's president informing him as follows:

> The final proposal which was made to you and the members of your negotiating committee on August 17, 1979, was contingent on acceptance of that offer without a work stoppage.
>
> Since Local 259 elected to reject that offer and calls (sic) a strike on August 18, 1979, the Company's last offer is hereby withdrawn.

A petition to decertify the Union was filed on September 6, 1979. The Regional Director approved a stipulation for a consent election on October 2, 1979 and an election was held on October 19, 1979, resulting in a vote against the Union. The Union, however, filed objections to the election and subsequently the decertification petition was dismissed. The Company's request for review of the dismissal was denied without prejudice to the right of the Company to reinstate the request following resolution of the unfair labor practice charges here in issue.

Thereafter, the Board concluded, the Company engaged in a series of unfair labor practices including, among others, threatening to "bust" the Union, threatening to close the plant, conducting surveillance of Union activities,

discharging an employee for her Union involvement, unilaterally instituting an attendance bonus plan and establishing an employee committee and bargaining with that committee.[2]

Following the filing of the decertification petition, the Union, on September 7, 1979, submitted a contract proposal to the Company. The Company responded to this proposal on September 11, 1979 by stating that it would not schedule further bargaining sessions "until the [decertification] petition has been resolved".

It is undisputed, and the Board found, that the strike was an economic strike at its inception. However, the Board concluded that the Company's withdrawal of its contract offer on August 27, 1979 was a violation of §8(a)(5) of the Act and, more importantly, that this violation "converted" the strike into an unfair labor practice on that date. Accordingly, the Board's order directs the Company to reinstate every striker who made an unconditional offer to return to work after August 27, 1979.

In support of its finding, the Board properly noted that this Circuit has previously held that "if an unfair labor practice is a 'contributing cause' of a strike, then, as a matter of law the strike must be considered as an unfair labor practice strike." *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975). Where, as in the instant case, the strike was initially an economic strike, an unfair labor practice will convert the strike into an unfair labor practice strike if it prolongs the strike. *Rogers Manufacturing Co. v. NLRB*, 486 F.2d 644 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).

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2. The Company did not object to the Board's finding regarding the establishment of the employee committee and thus the finding is not in dispute in this appeal.

However, before the foregoing principles are applicable, substantial evidence must support the Board's finding that a "converting" unfair labor practice did, in fact, transpire. As previously indicated, the Board concluded that the Company's withdrawal of its final contract offer subsequent to the commencement of the strike constituted a refusal to bargain in violation of §8(a)(5) of the Act.

This Circuit, however, has recently held that "an employer has a right to withdraw proposals made before a strike to reflect the changed economic background." *Pease Co. v. NLRB*, 666 F.2d 1044 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3916 (May 18, 1982). The Company's withdrawal of its final contract offer in the instant case, like the employer's action in *Pease*, was simply a legitimate bargaining tactic which the Company was entitled to employ.[3] Therefore the Company did not commit an unfair labor practice on August 27, 1979 and, accordingly, of course, the strike was not converted to an unfair labor practice strike on that date.

However, as previously indicated, the Company notified the Union on June 11, 1979, that it flatly refused to bargain with the Union and justified this refusal by reference to the pendency of the decertification petition. The Board also found that this refusal to bargain constituted an unfair labor practice.

It is, as the Company urges, permissible for an employer to refuse to bargain with a Union under circumstances where the Company entertains a good faith doubt

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3. To the extent the Board relies, is an effort to ascribe pernicious overtones to the August 27th withdrawal, on its finding that an August 16, 1979 memo from the Company to its employees constituted an unfair labor practice, that reliance is ill-fated. The August 16, 1979 memo contained "no threat of reprisal or force or promise of benefit" and accordingly, did not constitute a violation.

as to the Union's status of bargaining representative for a majority of employees. However, "the mere filing of a decertification petition is of itself insufficient justification" to support such a refusal. *Rogers Manufacturing Co., supra* at 647. Rather, the employer must advance "evidence indicating that a good faith doubt was reasonably grounded." *Id.* The Company in the instant case failed to introduce such evidence. Moreover, by September 11, 1979 the Company had undertaken to engage in other unfair labor practices, including unilaterally raising starting wages and firing striking probationary employees. These actions on the part of the Company "cast a shadow on its allegations of good faith." *Id.*

The Court concludes that the Board's finding that the Company's refusal to bargain with the Union on and after September 11, 1979 was a violation of §8(a)(5) is supported by substantial evidence. Moreover, this refusal obviously prolonged the strike, thereby converting it into an unfair labor practice strike on September 11, 1979. The remaining findings and conclusions of the Board are clearly supported by substantial evidence.

Accordingly, the Board's order as modified herein is hereby enforced.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: DECEMBER 7, 1982

COSTS: NONE

APPENDIX C

(Filed November 29, 1982)

No. 81-1194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALKER DIE CASTING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Cross-Petitioner.

ORDER

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and WEICK, Senior Circuit Judge

Upon consideration, no judge having favored rehearing en banc, the Court concludes the issues joined in the petition for rehearing were fully considered in the original submission and decision in the present case. Accordingly, the petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Office-Supreme Court, U.S.
FILED
APR 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1417

In the Supreme Court of the United States

OCTOBER TERM, 1982

WALKER DIE CASTING, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that the filing of a decertification petition when petitioner was engaging in unfair labor practices did not justify petitioner's refusal to bargain with the Union.

2. Whether substantial evidence supports the finding that petitioner's unlawful refusal to bargain with the Union prolonged the strike, thereby converting it to an unfair labor practice strike.

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Statute:

National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* :

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A65-A69) is reported at 682 F.2d 592. The Board's decision and order (Pet. App. A1-A61) are reported at 255 N.L.R.B. 212.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1982. A petition for rehearing was denied on November 29, 1982. The petition for a writ of certiorari was filed on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 158(a), 159(a) and (c), are reproduced at Pet. 2-3.

STATEMENT

1. On August 18, 1979, petitioner's production and maintenance employees struck in dissatisfaction with the progress of bargaining negotiations for a new contract.[1] On August 27, petitioner wrote to the Union[2] withdrawing the final contract proposal which it had made just before the strike began (Pet. App. A13, A45-A46).

Shortly after the strike began, petitioner started to keep the Union's meetings under surveillance (Pet. App. A27-A28). Around September 1, petitioner's president informed employee Wendell Pigg that petitioner wanted to "get rid" of the Union (*id.* at A22). On September 5, petitioner discharged eleven striking probationary employees (*id.* at A30-A31). On the same day petitioner unilaterally raised the minimum starting wage rate above what it had offered during negotiations (*id.* at A47-A50).

On September 6, 1979, a decertification petition was filed with the Board (Pet. App. A14 n.3), and on September 7, the Union submitted a new contract proposal to petitioner (*id.* at A14). On September 11, however, petitioner notified the Union that no further meeting could be scheduled until the matter of the decertification petition had been resolved (*id.* at A50). At no time thereafter did petitioner offer to reopen negotiations with the Union. In fact, petitioner's president subsequently informed employees that petitioner would set up an employee committee to handle grievances, and such a committee was implemented in the spring of 1980 (*id.* at A41-A45).

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[1]Two days prior to the strike, on August 16, petitioner had advised its employees by memo that it planned to continue operations in the event of a strike, and suggested that employee union members "may want to resign from Union membership before crossing the picket line" (Pet. App. A18).

[2]Local 259, Stove, Furnace, and Allied Appliance Workers' International Union of North America, AFL-CIO.

During the course of the strike, petitioner also threatened to shut the door of the plant rather than continue to deal with the Union president (Pet. App. A24); offered wage increases to induce its employees to break the strike and return to work (*id.* at A23); told employees that, if it had to reinstate everybody in the Union, it was in no hurry to resume negotiations (*id.* at A23-A24); told an employee that by returning to work after engaging in a strike she had lost her seniority status (*id.* at A25); informed employees that they would not be considered for employment until after the decertification election (*id.* at A25-A26);[3] removed employees' picket signs (*id.* at A26-A27); advised employees to resign from the Union (*id.* at A18); and told employees that they would have a good place to work once the Union was defeated (*id.* at A29). In addition, petitioner refused to reinstate and then discharged one employee (Becquet) because she was a union "ringleader" (*id.* at A32-A39).

2. The Board found that petitioner had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by making threats to employees during the course of the strike, by soliciting employees to cease supporting the strike, and by keeping union activities under surveillance (Pet. App. A20-A30, A52-A53). The Board also found that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging its probationary employees; by refusing to reinstate employee Becquet on September 12; by refusing to reinstate her on September 24 without loss of seniority privileges; and by discharging her on November 16 because of her union activities (Pet. App. A30-A40, A53).

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[3]An election was held on October 19, 1979, which the Union lost by a vote of 70 to 58, with 36 ballots challenged. Union objections were filed on October 26; a hearing was held, but the Regional Director dismissed the decertification petition because of this unfair labor practice proceeding. The Board denied petitioner's request for review without prejudice to the petition being reinstated, depending on the outcome of this proceeding (Pet. App. A14 n.3).

The Board further found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally changing wages and other conditions of employment, advising employees to resign from the Union, withdrawing its last contract proposal, and refusing to negotiate with the Union since September 11, 1979 (Pet. App. A45-A51, A53). In finding that petitioner unlawfully refused to bargain after the decertification petition was filed, the administrative law judge, whose decision in this regard was adopted by the Board, explained (Pet. App. A50; footnote omitted): "The law is clear that the filing of a decertification petition is not sufficient basis to justify an employer's refusal to bargain when, as here, the [employer's] action occurred in context with unlawful conduct."

Finally, the Board found that the economic strike was converted to an unfair labor practice strike on August 27, 1979, when petitioner withdrew its final offer and thereby "seriously impeded the success of the negotiations and thus prolonged the strike" (Pet. App. A52). Petitioner therefore violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offers to return to work (Pet. App. A53).[4]

3. The court of appeals upheld the Board's unfair labor practice findings, except for the findings that the August 16th notice (that employees could resign from the Union) and petitioner's August 27 withdrawal of its final contract offer violated the Act (Pet. App. A68).[5]

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[4]Petitioner did not except to the administrative law judge's finding that its conduct in establishing an employee grievance committee violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2) (Pet. App. A53). That portion of the Board's decision was thus not contested in the court of appeals.

[5]The court stated that " 'an employer has a right to withdraw proposals made before a strike to reflect the changed economic background' " (Pet. App. A68, quoting *Pease Co.* v. *NLRB*, 666 F.2d 1044 (6th Cir.

The court agreed with the Board that petitioner's refusal to bargain with the Union on September 11, 1979 was a violation of Section 8(a)(5) and (1) of the Act. Finding that this refusal to bargain "obviously prolonged the strike," the court concluded that petitioner's unlawful conduct converted the economic strike into an unfair labor practice strike on September 11 rather than on August 27, as the Board had found (Pet. App. A69). The court stated (*ibid.*):

> "the mere filing of a decertification petition is of itself insufficient justification" to support such a refusal. *Rogers Manufacturing Co.*, [486 F.2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974)]. Rather, the employer must advance "evidence indicating that a good faith doubt was reasonably grounded." *Id.* The Company in the instant case failed to introduce such evidence. Moreover, by September 11, 1979 the Company had undertaken to engage in other unfair labor practices, including unilaterally raising starting wages and firing striking probationary employees. These actions on the part of the Company "cast a shadow on its allegations of good faith." *Id.*

ARGUMENT

Petitioner, relying on *Telautograph Corp.*, 199 N.L.R.B. 892 (1972), contends (Pet. 6-10) that it was entitled to suspend bargaining with the Union because of the filing of the decertification petition. Petitioner further contends that the contrary position of the Board, upheld by the court of appeals, conflicts with *Telautograph* and with the decisions of courts of appeals that have upheld that rule. There is no merit to this contention.

1981), cert. denied, No. 81-1710 (May 17, 1982)). The court found that the August 16 notice contained " 'no threat of reprisal or force or promise of benefit' " (Pet. App. A68 n.3). No issue concerning the propriety of these findings is raised here.

In *Telautograph* the Board held that, where a decertification petition has been filed and there is no evidence of previous unfair labor practices which may have caused decline in union support, the employer must discontinue bargaining with the union until after the question of representation has been settled by the Board.[6] That rule is inapplicable here since petitioner committed unfair labor practices which may have caused a decline in support for the Union.

The cases cited by petitioner (Pet. 10) are not to the contrary. In *Sahara-Tahoe Corp.* v. *NLRB*, 648 F.2d 553 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981), the court noted the Board's position in *Telautograph* "that where a decertification petition is timely filed by employees and there is no evidence of unfair labor practices that may have induced a decline in union support, the employer must discontinue bargaining with the incumbent union until the question of representation has been settled by the Board" (648 F.2d at 556; footnote omitted). However, there the court agreed with the Board that the invalid decertification petition did not justify the employer's refusal to bargain (*id.* at 557). *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850 (5th Cir.), cert. denied, 439 U.S. 893 (1978), involved a refusal to bargain based not on the filing of a decertification petition, but on other grounds which the court found to be insufficient. The court stated that "[t]he kind of 'objective evidence' ordinarily sufficient to overcome a rebuttable presumption of majority support would be greater than fifty percent employee support for a decertification petition, or thirty percent support for decertification combined with other indicia of non-support" (571 F.2d at 859; citation

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[6]In *Dresser Industries*, 264 N.L.R.B. No. 145 (Sept. 30, 1982), slip op. 3-6, the Board overruled *Telautograph* and held that the filing of a decertification petition would not permit an employer to suspend bargaining with an incumbent union. However, the Board held that the rule adopted in *Dresser* would be applied prospectively (slip op. 6). It was not applied here by the Board or by the court of appeals.

omitted). And in *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 195 (8th Cir. 1974), the court, in allowing reliance on the decertification petition, expressly found that the employer had not committed unfair labor practices which "contributed * * * to the possible loss of majority status by the Union."

Here the Board and the court of appeals found that the decertification petition was filed in a context of unfair labor practices which would tend to undermine the Union's strength.[7] In these circumstances there is no occasion for the application of the *Telautograph* rule.[8]

2. Petitioner also contends (Pet. 10-12) the court of appeals erred in concluding that the strike was converted to an unfair labor strike merely because petitioner had committed unfair labor practices, without finding that petitioner's unlawful conduct prolonged the strike. However, the court did find that the suspension of bargaining "obviously prolonged the strike, thereby converting it into an unfair labor practice strike on September 11, 1979" (Pet. App. A69). That finding is plainly correct, and in accord with settled principles. See *NLRB* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768, 772 (9th Cir. 1965); *Allied Industrial Workers* v. *NLRB*, 476 F.2d 868, 882-883 (D.C. Cir. 1973). Here, the origin of the strike was the inability of petitioner and the Union to reach agreement on a new contract. In

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[7]Petitioner does not dispute that it committed the unfair labor practices found by the Board and upheld by the court of appeals.

[8]While the court of appeals did assert that the filing of a decertification petition was insufficient standing alone to justify a refusal to bargain, it also relied on the fact that petitioner engaged in contemporaneous unfair labor practices. See *Rogers Manufacturing Co.* v. *NLRB*, 486 F.2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974).

these circumstances, it is reasonable to infer that suspension of negotiations, which precluded any opportunity for the parties to attempt to reach agreement, prolonged the dispute.[9] In any event, whether the court of appeals properly concluded that substantial evidence supported the Board's decision on this issue is a factual question that does not warrant review by this Court.

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[9]Contrary to petitioner's contention (Pet. 11), it is not necessary to find that a strike is "*primarily*" due to unfair labor practices, or that "such practices *actually were considered by* the employees in their decision to strike or to continue" striking, to conclude that a strike was converted to an unfair labor practice strike. *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055 (1st Cir. 1981) (Pet. 11), does not so hold. There the court stated that the issue was: "Was the unfair labor practice a proximate cause of the lengthening of the strike?" (652 F.2d at 1080). In making the assessment (*ibid.*; citations omitted):

> it need not be shown that the employer's unfair labor practice was "the sole or even the major cause or aggravating factor of the strike," but only that it was "*a contributing factor.*" The new issue injected into the bargaining process by the employer's violation "need not be the sole cause for failure to agree."
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> Both objective and subjective factors may be probative of conversion. Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. Did they continue to view the strike as economic or did their focus shift to protesting the employer's unlawful conduct? However, in examining the union's characterization of the purpose of the strike, the Board and court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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